

No. 11311

United States
Circuit Court of Appeals

For the Ninth Circuit.

RAILWAY MAIL ASSOCIATION,
a corporation,

Appellant,

vs.

JENNIE M. BABBITT,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington
Northern Division

FILED

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PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of
Washington for King County

No. 352679

JENNIE M. BABBITT,

Plaintiff,

vs.

RAILWAY MAIL ASSOCIATION, a corporation,
Defendant.

COMPLAINT

For cause of action against the defendant, plaintiff complains and alleges:

I.

The plaintiff, residing at Seattle, King County, Washington, is the widow of Fred I. Babbitt, who died in Seattle, Washington on July 30, 1943.

II.

The defendant is a corporation, incorporated under the laws of New Hampshire, maintaining a so-called "Seattle Branch," and doing business in Seattle, King County, Washington, of which G. K. Chaplin, residing at Seattle, is president.

III.

On February 1, 1924, while the said Fred I. Babbitt, residing at Seattle, was a Railway Postal Clerk in the Railway Mail Service of the United States, for a valuable consideration, the defendant, of which the said Fred I. Babbitt was a member,

issued to Fred I. Babbitt its Beneficiary Department Certificate No. 6057 which provided that if the member named in the certificate shall receive bodily injuries during the continuance of the certificate through external, violent and accidental means not the results of his own vicious, or intemperate conduct, which shall wholly and continuously disable him from following the occupation of a Railway Postal Clerk in the Railway Mail Service of the United States, he shall be entitled to receive from said Benefit Fund in the following manner, to-wit: * * * *

4. If death shall result from such injuries alone within one year from the date of the injury, the Association will pay [6] \$4,000.00 * * * to Jennie M. Babbitt, his wife, and the certificate further provided that accidental death shall be construed to be either sudden or violent death from external, violent and accidental means, resulting directly, independently and exclusively of any other causes, and not the direct or indirect result of the member's own vicious or unlawful conduct; or death within one year, as the sole result of accidental means alone, and there shall be no liability whatever when disease, defect or bodily infirmity is a contributing cause of death.

IV.

Because Fred I. Babbitt became afflicted with multiple sclerosis, and being physically unable to perform the duties of a Railway Postal Clerk, on July 31, 1938, the said Fred I. Babbitt was retired

as a Railway Postal Clerk, and the said Fred I. Babbitt ever since July 31, 1928, and until his death, was wholly and continuously disabled from following the occupation of a Railway Postal Clerk in the Railway Mail Service of the United States because of his physical condition and the multiple sclerosis he was afflicted with, as the defendant and its officer on July 31, 1928, and at all times since then well knew.

V.

In order to keep the said Beneficiary Certificate in full force and effect the said Fred I. Babbitt from July 31, 1928, was obligated to and did pay the defendant the sum of \$1.50 per month, making the payments every two months, and in addition thereto paid certain special assessments from the date of the issuance of said certificate until the date of his death, which payments of the defendant and its officer received and accepted since July 31, 1928, well knowing that Fred I. Babbitt was physically unable to perform the duties of a Railway Postal Clerk.

VI.

By accepting the said payments hereinbefore mentioned from the said Fred I. Babbitt since July 31, 1928, the defendant modified the agreement between the parties and waived the provisions that the bodily injuries received shall wholly and continuously [7] disable him from following the occupation of a Railway Postal Clerk in the Railway Mail Service of the United States, and also modified the agreement and waived the provision that

the accidental death as therein defined shall be independently and exclusively of any other causes, and that there shall be no liability whatsoever when disease if defect or bodily infirmity is a contributing cause of death, for the reason that the defendant well knew at all times since July 31, 1928, that Fred I. Babbitt was suffering with a physical affliction to the extent that he was unable to perform the duties of a Railway Postal Clerk.

VII.

On June 9, 1943, at about 7:15 a.m., the said Fred I. Babbitt slipped on a rug in his home at 4116 Corliss Avenue, Seattle, Washington, fell, fracturing his left hip, which caused a fat embolus to his lungs and brain, and he died on July 30, 1943, the cause of his death being due to the fracture occasioned by the accident of his falling as hereinabove stated, and his death did result from said injuries through external, violent and accidental means, not the result of his own vicious or intemperate conduct.

VIII.

Within sixty days after the death of Fred I. Babbitt, the plaintiff, as beneficiary under the said certificate, notified G. K. Chaplin, the branch president of the defendant, of the death of Fred I. Babbitt, and filed her proof of claim on the forms provided by the defendant, which the Committee of Claims of the defendant disallowed. Thereupon the plaintiff appealed to the National Executive Committee of the defendant, and on October 21, 1943,

by a vote of seventeen to two, the defendant rejected the claim of the plaintiff and so advised her.

IX.

The full sum of \$4,000.00, with interest at 6% from July 30, 1943, is due and owing from the defendant to the plaintiff.

Wherefore, plaintiff demands judgment against the defendant [8] in the sum of \$4,000.00, with interest at 6% from July 30, 1943.

LUNDIN & BARTO,
Attorneys for Plaintiff.

(Duly verified.)

[Endorsed]: Filed May 1, 1944. [9]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL

To the Honorable Presiding Judge of the Superior
Court of the State of Washington, for King
County:

The defendant in the above entitled action Petitions and shows to this Court as follows:

I.

That the above entitled action was commenced against it in the above entitled Court by the purported service of Summons and Complaint upon G. K. Chaplin, on May 5, 1944, and that the time within which this defendant is required by the Laws

of the State of Washington, and the Rules of the Superior Court to Answer or Plead to the Complaint herein has not expired.

II.

The said action involves a controversy which is wholly between the citizens of different states. At the time of the commencement of this action, the plaintiff herein was and at all times since has been and still is a resident and citizen of the State of Washington, and a resident and citizen of the Western District of Washington, and she has not at any of said times, nor is she now a resident or citizen of the State of New Hampshire.

III.

During all the times mentioned in plaintiff's Complaint and at the time of the commencement of this action and all times since then, the defendant Railway Mail Association was and is now an association organized and existing under and by virtue of the Laws of the State of New Hampshire, and having its principal [10] place of business at Portsmouth, in said State, and is a citizen and resident of said State and it was not at any of said times, and is not now a resident or citizen of the State of Washington, or of the Western District of Washington.

IV.

The above entitled action is a controversy between the plaintiff and the defendant and that the said action or suit is of a civil nature, to-wit:

An action by the plaintiff to recover upon one

of its Beneficiary Department Certificates in the amount of \$4,000.00 payable upon the terms and conditions set out therein to the plaintiff in the event of the accidental death of Fred I. Babbitt as provided in the said Certificate, and that the matter in controversy in this suit or action at the time of the commencement thereof and now exceeds the sum of \$3,000.00 exclusive of interest and costs as appears from the allegations of the plaintiff's Complaint.

V.

This Defendant, the Railway Mail Association has given the Plaintiff herein written notice of this Petition for Removal and of its Bond for Removal herein prior to the filing of same.

VI.

Your Petitioner herein presents a good and sufficient bond for its entering in the District Court of the United States for the Western District of Washington, Northern Division within thirty days from the filing of this petition, a certified copy of the record in this suit and for paying the costs that may be awarded by said District Court, if said Court shall hold that this cause was wrongfully or improperly removed thereto.

Wherefore, your Petitioner Prays that this Court proceed no further herein except to make the Order of Removal required by law to accept such bond and security and to cause the record herein to be removed to the District Court of the United States

for the Western District of Washington, Northern
Division.

CATLETT, HARTMAN, JARVIS
& WILLIAMS,

Attorneys for Petitioner. [11]

(Duly verified.)

[Endorsed]: Filed May 24, 1944. [12]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 945

JENNIE M. BABBITT,

Plaintiff,

vs.

RAILWAY MAIL ASSOCIATION,

Defendant.

ANSWER

Answering plaintiff's complaint, the defendant
alleges:

I.

Answering paragraph I, admits the allegations
therein contained.

II.

Answering paragraph II, admits it is a non-profit
Fraternal Beneficial Association of Railway Postal
Clerks of the United States Railway Mail Service.

That its Charter was issued by the State of New Hampshire, and that it is maintaining an office or branch in Seattle, Washington.

III.

Answering paragraph III, admits the allegations therein contained, and that the Certificate mentioned therein contains among others, the provisions therein set out.

IV.

Answering paragraph IV, admits that Fred I. Babbitt became affected with multiple sclerosis some years prior to July 31, 1928, the date and time of said affliction being unknown to the defendant. Admits that the said Fred I. Babbitt was so afflicted on July 31, 1928, and that on or about said date by reason of such affliction he was retired as a railway postal clerk. [20] Admits he continued to be afflicted with multiple sclerosis continuously until the date and time of his death, July 30, 1943, and by reason thereof was wholly and continuously disabled from following the occupation of railway postal clerk. Denies each and every other allegation contained in the said paragraph IV.

V.

Answering paragraph V, admits that Fred I. Babbitt made the payments therein alleged. Denies each and every other allegation therein contained.

VI.

Answering paragraph VI, denies the defendant modified or that there was any modification of the

agreement between Fred I. Babbitt, and this defendant contained in the terms of the Beneficiary Department Certificate described and alleged in paragraph III of plaintiff's complaint, and the charter, constitution and bylaws of the defendant, which are a part thereof and copies of which are in the possession of the plaintiff, denies that the said agreement was modified or changed or any of the provisions thereof waived as alleged in said paragraph VI for the reason set out therein or for any reason whatsoever.

VII.

Answering paragraph VII, admits that Fred I. Babbitt died on July 30, 1943. The defendant has not sufficient knowledge nor information to form a belief as to whether he slipped on a rug as therein alleged and, therefore, denies that allegation. Denies that the fracture of his left hip caused fat embolus to go into his lung or brain. Denies that the cause of his death was due to the fracture alleged in said paragraph. Denies that his death resulted from said injuries alleged in said paragraph or thru any external, violent and accidental means. [21]

VIII.

Answering paragraph eight, admits the allegation therein contained.

IX.

Answering paragraph nine, denies that the sum of \$4,000 or any sum whatsoever or any interest is due and owing from the defendant to the plaintiff.

Further answering plaintiff's complaint and for a First Affirmative Defense, the defendant alleges:

I.

The Charter, Constitution and Bylaws of the defendant which were, at all times alleged in plaintiff's complaint, a part of the contract or agreement between the deceased Fred I. Babbitt and the defendant, and subsequently to his death, with any person claiming an interest in said certificate, or any rights thereunder, contained at all said times and now contain the following, among other provisions:

Article XVI, Sec. 17. "No action, suit, or proceedings at law or in equity shall be brought for recovery under the certificate of membership, in the Beneficiary Department within three months from the date of the filing of complete proofs at the Association's office, nor brought or maintained at all, unless begun within three months after mailing of notice of rejection of the claim by the Association or within two years from the day of death or the termination of temporary disability, or the commencement of permanent total disability within the terms of the certificate nor unless claimant has exhausted all of his or her rights under Section 12 of this Article. Claims not noticed, proved, or prosecuted as above provided will be forfeited to the Association."

This action was not brought nor commenced within the time provided in said Article, and Sec-

tion of the Charter, Constitution and Bylaws of the defendant.

As a Second Affirmative Defense, the defendant alleges: [22]

I.

The said Charter, Constitution and Bylaws of the defendant at all times during the existence of the Beneficiary Department Certificate described and alleged in paragraph III of plaintiff's complaint and which Charter, Constitution and Bylaws were at all times a part of the said Certificate provided, at all times mentioned in plaintiff's complaint and do now, among other things, the following:

Article XVI, Sec. 8 (d). "Accidental death and accidental injuries are defined to be either sudden, violent death, or accidental injuries, from violent and accidental means alone, resulting directly, independently and exclusively of all other causes, and not the result of the member's own vicious, intemperate, or unlawful conduct, and producing visible marks or other evidence of injury or violence on or within the body of the member. There shall be no liability whatever unless death or disability results wholly from the injury, nor when any disease, defect or bodily infirmity is a contributing cause of death or injury, * * * *."

II.

The said Certificate mentioned and alleged in paragraph III of plaintiff's complaint, at all times

since its issuance contained and now contains among other provisions the following:

“Provided, however, no benefit or sum whatsoever shall be payable in any case whatsoever unless the accident alone results in producing visible external marks of injury or violence suffered by the body of the member, nor unless the death or disability results wholly from the injury, and within one year from the date thereof. * * * ”

“Accidental death shall be construed to be either sudden, violent death from external violent and accidental means resulting directly, independently and exclusively of any other causes, and not the direct or indirect result of the member’s own vicious or unlawful conduct; or death within one year, as the sole result of accidental means alone. There shall be no liability whatever when disease, defect, or bodily infirmity is a contributing cause of death. * * * ”

III.

The death of the said Fred I. Babbitt did not result wholly or at all from the injury alleged in plaintiff’s complaint. The death of the said Fred I. Babbitt did not result from external violent and accidental means resulting directly, independently and exclusively of any other causes. The death of the said Fred I. Babbitt was not the sole result of accidental means alone. Disease, defects or bodily infirmity was the cause [23] of or a contributing cause of the said death.

Wherefore, having fully answered plaintiff’s com-

plaint, the defendant prays that it be dismissed and that it recover its costs and disbursements herein.

CATLETT, HARTMAN, JARVIS
& WILLIAMS,

Attorneys for Defendant.

Copy received July 10, 1944. Lundin & Barto.

[Endorsed]: Filed July 11, 1944. [24]

[Title of District Court and Cause.]

REPLY

Replying to the defendant's Answer, the plaintiff alleges:

1.

Replying to Paragraph 1 of the First Affirmative Defense, the plaintiff admits that Article 16, Section 17, of the Constitution of the defendant, contained the provision therein set forth, and the plaintiff denies each and every other allegation in said Paragraph contained.

2.

Replying to Paragraph 1 of the Second Affirmative Defense in the Answer contained, the plaintiff admits that Article 16, Section 8 (d) contains the provision therein set forth, and the plaintiff denies each and every other allegation in said Paragraph contained.

3.

Replying to Paragraph 3 of the Second Affirmative Defense this plaintiff denies each and every allegation thereof.

And in reply to the allegations contained in said Answer the plaintiff alleges: [25]

1.

At all times since July 31st, 1928, the defendant, its officers and agents, well knew that Fred I. Babbitt was totally disabled, and by the acceptance of the bi-monthly payments made by Fred I. Babbitt to the defendant the defendant waived the provisions to an accidental death, as set forth in Paragraph 1 and 2 of the Second Affirmative Defense of the Defendant's Answer, and by such acceptance of the bi-monthly payments the contract became modified by mutual consent, and the defendant became obligated to pay upon its beneficiary certificate, even though Fred I. Babbitt was unable to perform the duties of a railway postal clerk, and even though the deceased's defect or bodily infirmity he had on July 31st, 1928, might have been a contributing cause of his death.

Wherefore plaintiff prays judgment in accordance with the prayer of her complaint.

/s/ LUNDIN & BARTO,
/s/ ALFRED H. LUNDIN,

Attorneys for Plaintiff.

Copy received 10/4/44. Catlett, Hartman, Jarvis & Williams, for Defendant.

[Endorsed]: Filed Oct. 4, 1944. [26]

[Title of District Court and Cause.]

MOTION TO STRIKE DEMAND FOR JURY

Defendant respectfully moves this Court for an order striking Plaintiff's demand for jury on the grounds and for the reasons that:

The said demand for jury trial was not served nor filed herein within the time prescribed by the practice and applicable rules of procedure relating thereto.

That all issues in the above entitled action were made up and determined ten days before the service or filing herein of said demand for jury trial.

That the issues in the above entitled cause are not tryable by jury.

That the above entitled cause has heretofore been placed on this Court's non-jury trial calendar and continued as such non-jury case thereon.

**CATLETT, HARTMAN, JARVIS
& WILLIAMS,**

Attorneys for Defendant.

Copy received. Lundin & Barto, Attys. for Plf.

[Endorsed]: Filed Oct. 11, 1944. [30]

[Title of District Court and Cause.]

ORDER ON DEFENDANT'S MOTION TO
STRIKE DEMAND FOR JURY AND
PLAINTIFF'S MOTION FOR JURY
TRIAL

After argument by counsel for plaintiff and defendant on the motion to strike plaintiff's demand for jury and the plaintiff's motion for order directing trial by jury.

It is hereby Ordered that at the time of the trial of the above entitled cause a jury be impaneled to hear such issues of fact as may arise in the trial of this cause and as the Court at the trial hereof may direct be decided by the said jury and to act in an advisory capacity herein in connection with such issues of fact as the Court may refer to the said jury for that purpose to which the defendant excepts and its exception is allowed.

Dated this 17th day of October, 1944.

LLOYD L. BLACK,

United States District Judge.

Presented by:

D. H. JARVIS.

O.K. as to form.

ALFRED H. LUNDIN.

[Endorsed]: Filed Oct. 17, 1944.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the Above-Mentioned Cause,
Find for the Plaintiff in the amount of Four Thousand (\$4000.00) Dollars.

Dated this 9th day of August, 1945.

LLOYD X. CODER,
Foreman.

[Endorsed]: Filed Aug. 9, 1945. [33]

[Title of Court and Cause.]

ALTERNATIVE MOTION FOR JUDGMENT
OR NEW TRIAL

Defendant moves the Court to set aside the verdict entered in the above entitled cause on August 9, 1945, and to enter judgment in accordance with its motion for directed verdict on the ground that the motion for directed verdict should have been granted because among other grounds and reasons:

(1) The record in this case shows that plaintiff's demand for jury trial was stricken herein and it was ordered that this case be tried by a jury acting only in an advisory capacity, and there was no issues of fact sufficient to submit to the said jury;

(2) That there was not sufficient evidence to justify the submission of this cause to the jury at the

conclusion of the plaintiff's testimony or at the conclusion of all of the testimony, and by reason thereof this case should have been dismissed by the Court, or the jury should have been directed to bring in a verdict for the defendant;

(3) There was prejudicial admission of evidence in the trial of this case and prejudicial admission of medical testimony and conclusions to which proper objections were made, and if said objections had been sustained there was not sufficient evidence to submit to the jury, or if submitted [35] the jury should have been instructed by the Court to bring in a verdict for the defendant;

(4) Because of errors and matters hereinafter recited in defendant's motion for new trial.

The above entitled motion is made without waiving the defendant's position at the time of the trial; that this matter should have been decided as a matter of law upon the pleadings and plaintiff's case dismissed thereon; that the Court improperly directed the amendment of plaintiff's complaint; that the Court improperly submitted any issue of fact to the jury; that the jury was impaneled and any issue of fact was submitted to it in other than an advisory capacity, and that there were any issues of fact which could properly be submitted to the jury at all.

In the alternative, defendant moves the Court to set aside the verdict and grant defendant a new trial on the following grounds among others:

(1) The irregularity in the proceedings of the Court, jury or adverse party; orders of Court and

abuse of discretion by which the defendant was prevented from having a fair trial;

(2) Misconduct of prevailing party and jury;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) That there was no evidence or reasonable inference from the evidence to justify the verdict or the decision and that it is contrary to law;

(5) Error in law occurring at the trial and excepted to at the time by the defendant;

(6) The Court directing and permitting the amendment of plaintiff's complaint at the time of trial;

(7) The Court submitting any issue of fact herein to [36] a jury;

(8) The Court submitting any issue of fact herein to a jury in other than an advisory capacity;

(9) The Court permitting the introduction of plaintiff's Exhibit 5, (a picture of Fred I. Babbitt taken in 1932);

(10) The Court permitting the introduction of plaintiff's Exhibit 4, because not sufficient or properly identified, or at all;

(11) The Court overruling defendant's objections of defendant to testimony of Jennie M. Babbitt in regard to the physical condition of Fred I. Babbitt,

and the apparent effects of disease ascertainable only by expert testimony;

(12) The Court overruling defendant's objections to the statements of Dr. Don Palmer relative to the claimed cause of death of Fred I. Babbitt;

(13) Overruling of objections to the opinions and conclusions of Dr. Jacobson as to the claimed cause of death of Fred I. Babbitt;

(14) The failure to permit defendant's Exhibits 5 and 6 for identification, being copies of plaintiff's original complaint and reply on file herein to be introduced in evidence;

(15) The failure of the Court to dismiss this action at the conclusions of plaintiff's testimony;

(16) The failure of the Court to direct the jury to bring in a verdict for the defendant at the conclusion of plaintiff's testimony;

(17) The failure of the Court to give the instructions requested by the defendant;

(18) The giving of the instructions to the jury excepted to by the defendant. [37]

Defendant makes the foregoing motion without in any way waiving its position taken at the trial of the above entitled cause and heretofore stated herein in this motion for judgment.

CATLETT, HARTMAN, JARVIS
& WILLIAMS,

Attorneys for Defendant.

Copy received Aug. 17, 1945.

ANTHONY SAVAGE,
By ALICE PRITCHETT.

Copy received Aug. 18, 1945.

LUNDIN & BARTO,
By ALFRED H. LUNDIN.

[Endorsed]: Filed Aug. 18, 1945. [38]

[Title of District Court and Cause.]

ORDER DENYING ALTERNATIVE MOTION
FOR JUDGMENT OR NEW TRIAL

Be It Remembered that the defendant's alternative motion for judgment or new trial was by stipulation submitted to the court upon briefs; that the defendant served and filed its opening brief, and thereafter the plaintiff served and filed her answering brief, to which the defendant served its reply brief; and that thereafter the court having considered the matter in the light of the briefs filed by both parties, it is hereby

Considered, Ordered and Adjudged that the defendant's motion must be and hereby is denied. Exceptions allowed to defendant.

Done in Open Court this 4th day of January, 1946.

CHARLES H. LEVY,

District Judge for the Western District of Washington, Northern Division.

Presented by:

LUNDIN & BARTON,
ANTHONY SAVAGE,
Attorneys for Plaintiff.

(Acknowledgment of Service attached.)

[Endorsed]: Filed January 4, 1946.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 945

JENNIE M. BABBITT,

Plaintiff,

vs.

RAILWAY MAIL ASSOCIATION,

Defendant.

JUDGMENT

This action came on regularly for trial on the 8th day of August, 1945. The plaintiff appeared by her attorneys, Lundin & Barto and Anthony Savage. The defendant appeared by its attorneys, Catlett, Hartman, Jarvis & Williams. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider their verdict and subsequently returned into court, and being called, answered to their names and said:

We, the jury in the above entitled cause, find for the plaintiff in the amount of \$4000.00. Dated this 9th day of August, 1945. Lloyd S. Coder, Foreman.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is Considered, Ordered and Adjudged that Jennie M. Babbitt, plaintiff,

have and recover from Railway Mail Association, defendant:

1. The amount of \$4000.00.
2. Interest on \$4000.00 at the rate of 6% per annum from the 3rd day of October, 1943. [42]
3. Her costs and disbursements incurred in this action amounting to \$46.90.

Exceptions allowed to the defendants.

Dated this 4th day of Jan. 1946.

/s/ CHARLES H. LEAVY,
District Judge for the Western District of Wash-
ington, Northern Division.

Presented by: Anthony Savage & Lundin & Barto,
of Attorneys for Plaintiff.

Copy Rec'd. 11/28/45. Catlett, Hartman, Jarvis
& Williams, Attys. for Defendant.

[Endorsed]: Filed Jan. 4, 1946. [43]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Jennie M. Babbitt, and to her attorneys, Messrs.
Lundin & Barto, and Anthony Savage:

Notice is hereby given that Railway Mail Association, defendant above named, hereby appeals to the United States Circuit Court of Appeals, for the Ninth Circuit, from the final judgment entered in

the above entitled action upon the 4th day of January, 1946.

CATLETT, HARTMAN, JARVIS & WILLIAMS, & JAMES G. MULROY,

By JAMES G. MULROY,
Attorneys for Defendant.

[Endorsed]: Filed March 25, 1946. [44]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered 1 to 51, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Designation of Record filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle and that the same together with the Reporter's Transcript of Proceedings, the original of which is sent up as part of this record, constitute the record on appeal from the Judgment of said United States District Court for the West-

ern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit, dated January 4, 1946.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit: [49] Clerk's fees (Title 28, U.S.C. Supp. IV, Sec. 555) for making record:

4 Pages at 10c (Copies furnished)	\$.40
47 Pages at 40c	18.80
Notice of Appeal	5.00
	<hr/>
Total.....	\$24.20

I further certify that the foregoing amount ofhas been paid to me by the Attorneys for Appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle in said District, this 25th day of April, 1946.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy [50]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 945

JENNIE M. BABBITT,

Plaintiff,

vs.

RAILWAY MAIL ASSOCIATION,

Defendant.

TRANSCRIPT OF PROCEEDINGS

The Court: Now there are certain preliminary matters that perhaps will have to be disposed of before we proceed in the selection of a jury, and the first is whether or not there be a jury in this case.

I have read the pleadings and likewise the order that Judge Black made in the case at the time certain motions in reference to a jury were up and were disposed of, and whether Judge Black held that this, in his opinion, was an equity action and therefore no jury was required, or whether he denied—rather, I should say, struck the affirmative matter that was filed here some time in October of 1944 at the same time the jury demand was made, and in striking that concluded that a demand for a jury was not timely made. I do say that if the jury is to be called as his order would indicate, solely in an advisory capacity, the disposition of this Court would be not to call a jury.

Mr. Lundeen: If the Court please, the way the matter arose was due to my unfamiliarity with the

rules of court. I filed a reply, and immediately upon filing the reply made a demand for a jury under the rules of the court. The reply was stricken because no reply is necessary under the rules, or proper, and because this demand was late, counsel prevailed in having the demand stricken. [4*]

The rules of court provide for the granting of a jury, and then under the rules, I made an application for a jury, because it was——

The Court: I am quite familiar with the rules.

Mr. Lundeen: Yes, but I was just explaining my position, if the Court please, and the Court did grant my demand for a jury, and those are the facts and the reason for it.

The Court: But the granting was rather limited in itself.

Mr. Lundeen: He did state that he would—it would be advisory, and the order so provides. I do not know what Judge Black had in mind by stating that it would be advisory, because I regard this as a law case and not an equity case. It is under contract and that is his order, and we do desire the jury, and the reason the demand was first made, was because of my unfamiliarity with the rules, and Judge Black later having granted us the right to a jury, although he did qualify it as the order provides. We would like very much to have a jury trial in this sort of a cause.

The Court: I am rather under the impression, and of course the order of Judge Black would seem to lend weight to that impression, that this is an

* Page numbering appearing at foot of page of original Reporter's Transcript.

equity action, at least as to the initial issue in it. [5]

Mr. Lundeen: Well, I think it will develop into a law action. There are some allegations in our complaint that would give Your Honor that impression, but we now regard it as simply a law action.

The Court: Well, as I read your complaint, Mr. Lundeen, and the answer to it, and the issues that are thus framed, the initial issue that must be disposed of, before we can proceed at all to the second one is whether this contract of insurance was modified by reason of certain actions that took place as between the insured and the insurer, and whether the insurer would be estopped from denying such modification.

Mr. Lundeen: If that is the Court's attitude, we would prefer to waive those allegations and proceed as a law action.

The Court: Well, if you adopt the view that you are not going to make any proof of the issue of modification of the contract—

Mr. Lundeen: I think that is the position we will have to take.

The Court: Then you would immediately place yourself in a position where you would be subject to a motion for a summary judgment—that is, if you are relying upon the contract entirely, if I read your pleadings correctly. [6]

Mr. Lundeen: Well, we are relying on the contract, and that the injury was due to the accident. I don't see how we are entitled to summary judgment.

The Court: But you allege that the contract itself, provided among other things that he must—at least I gather this—now if I am wrong you correct me in it, that he must be in a physical condition to carry on his work as a railway mail clerk, before liability arises under the contract of insurance.

Mr. Lundeen: As I recall that, that was simply a provision relative to an accident that did not cause death. I think that under the terms of the policy he does not have——

The Court: I think, Mr. Lundeen, I will hear from the defendant and get their version of it.

Mr. Jarvis: May it please the Court, this action was started by the plaintiff against the defendant association to recover on an accident policy. I term it an accident policy, which may be a legal conclusion, but the fact is that the policy itself and that part that is set out in the plaintiff's complaint, only gives a benefit under the policy in the event of either accidental injuries or accidental death.

The plaintiff alleges in Paragraph III of her complaint that the policy was issued by the defendant [7] to the plaintiff, and that the policy in substance is summarized by the plaintiff in her pleadings, if the member—that was Mr. Fred I. Babbitt, who was named in the certificate as the insured, should receive bodily injuries during the continuance of the certificate through external, violent and accidental means not the results of his own vicious, or intemperate conduct, which shall wholly and continuously disable him from following the occupation of a Railway Postal Clerk, he would be

entitled to receive from said Benefit Fund in the following manner:

“If death shall result from such injuries alone within one year from the date of the injury, the Association will pay \$4,000.00.”

“Further provided that accidental death shall be construed to be either sudden or violent death from external, violent and accidental means, resulting directly, independently and exclusively of any other causes, and not the direct or indirect result of the member's own vicious or unlawful conduct; or death within one year, as the sole result of accidental means alone, and there shall be no liability whatever when disease, defect or bodily infirmity is a contributing cause of death.”

The limitation on the benefits that might be received, are contained not only in the granting part of the policy, but are contained in the provision that there [8] should be no liability whatever when disease, defect or bodily infirmity is a contributing cause of death.

The next paragraph alleges that Mr. Babbitt became afflicted with multiple sclerosis, in 1928, and being unable to perform his duties as a Railway Postal clerk, he was retired for such total disability on July 31, 1928, and until his death was wholly and continuously disabled from following the occupation of a Railway Mail clerk, and the multiple sclerosis with which he was afflicted, was known—that is, the officers of the defendant Railway Mail Association knew that he was afflicted with multiple sclerosis on July 31, 1928, and at all times since then.

The action is not brought to recover any benefit because of total disability, because the total disability was caused by disease alone, which not only was the sole cause but was the contributing cause of Mr. Babbitt's death.

Now this is a peculiar kind of a policy. As I say, it is a beneficial accident policy. Then it is alleged in the complaint that Mr. Babbitt paid the premiums that were called for in the policy, which I believe came to \$1.50 a month during the time he was incapacitated, and that the officers received and accepted the premiums knowing that Mr. Babbitt was physically unable to perform [9] his duties as a Railway Postal clerk.

Then it is alleged that by accepting the payments mentioned from Mr. Babbitt, the defendant modified the agreement between the parties and waived the provisions that the bodily injuries received shall wholly and continuously disable him from following the occupation of a Railway Postal clerk. Now that is one allegation of one modification of the terms of the contract between the defendant association and the plaintiff.

And then it is alleged that we—that is, the defendant Railway Mail Association, modified the agreement and waived the provision that accidental death as therein defined shall be independently and exclusively of any other causes, and that there shall be no liability whatsoever when disease or defect or bodily infirmity is a contributing cause of death, because we well knew at all times since July 31, 1928; that we had accepted premiums on these

monthly assessments on the policy—we waived that provision that death could not—that we waived the limiting provision that disease, defect or bodily infirmity could not be the cause of death.

Now the plaintiff proceeds in the complaint—first, they allege that the decedent, Mr. Babbitt, was suffering from multiple sclerosis and was wholly incapacitated from performing his occupation as a Railway Mail [10] clerk. Then they alleged in the next paragraph that by reason of that fact, and by reason of the fact that we knew of it, we waived the provision in the policy giving a benefit in the event of Mr. Babbitt's death, in that we waived the provision that there should be no liability if defect, or bodily infirmity or disease should be a contributing cause of death.

Then it is alleged that Mr. Babbitt fell down on July 9, 1943; that he suffered a fractured hip with a resulting embolus to the brain and to the lungs and that he died from it. Now the only possible, or the only theory or necessity for pleading the injury. I mean, the disease that Mr. Babbitt was afflicted with since 1928 up until the day of his death, was on the theory that we had waived one or more of the terms of the policy as it is substantially alleged—as it is actually alleged in the complaint. In other words, that we had waived the provision that disease, defect or bodily infirmity could not be a contributing cause of death. Now the only reason that we could waive that would be that he at the time of his death, was suffering from a disease or bodily infirmity which either was the cause

of death or was a contributing cause of his death. That is the only theory on which—that is the theory on which the complaint was drawn and was filed, and the [11] theory on which we have been put on trial, and our answer in this case—that is, that there could be no waiver as a legal matter, Your Honor, unless it is admitted in the complaint as a judicial admission that Mr. Babbitt was suffering from disease, defect, or bodily infirmity. That has to be admitted, either actually in the complaint—which it is, or impliedly, which it likewise is or there would be no purpose or theory in bringing—in alleging the mortal disease with which he was afflicted, and alleging that we had waived the provision of the complaint. In other words, that although he fell and died, the disease, defect or bodily infirmity, it is admitted, was a contributing cause of the death, and the only issue before Your Honor at this time is whether or not as a matter of law, or if facts, are introduced, whether or not as a matter of fact, and a concluding matter of law, we waived the expressed and written terms of the contract between the defendant association and Mr. Babbitt.

The Court: Very frankly, the Court is in doubt on this issue of a jury trial. If I take it from your argument that you admit that there are such issues here as to make of this a law action, rather than an equity action——

Mr. Jarvis: Your Honor, that of course is a question of law, I think. The contract is not in the [12] file, Your Honor.

The Court: No, it is not.

Mr. Jarvis: It could be decided on the pleadings as it is. That is, whether or not in accordance with the allegations of the complaint and that part of the contract that is set up in the complaint, there is—and solely, a question of law as distinguished from an issue of fact that should be decided by the jury. If the complaint is in the file, the whole issue of law could be decided by Your Honor without the aid of a jury.

If there is evidence, I don't know whether merely the putting of the contract, and then such modifications of it as the plaintiff may deem essential to a question of fact, would create an issue of fact or not. I do think under the pleadings as they now stand the defendant may be entitled, and I claim that the defendant is entitled, to a summary judgment, but if there is the issue that might be raised by putting before Your Honor the contract, and then the question of law to be drawn from the contract, and the pleadings. I don't know whether the mere placing of the contract in evidence would constitute such an issue that Your Honor should call the jury to act in an advisory capacity on that question, or not. In any event, the question of the jury acting in an advisory capacity, is, under the rules and under the [13] order of Judge Black is a matter that is discretionary with Your Honor, and is not mandatory one way or the other on any special issue that Your Honor might want to refer to the jury, so Your Honor could or could not, as Your Honor chose, refer that issue to the jury. It is our opinion that is the only issue before the Court.

Mr. Savage: May I address Your Honor?

The Court: Yes.

Mr. Savage: In view of the statements made by Your Honor, and counsel for the defendant, the plaintiff will now move to amend his complaint by striking therefrom any and all allegations to the effect that the contract was modified, and that the defendant did, by accepting payments of premiums and assessments which were due under the certificate of insurance—did waive this provision in the contract or is estopped, is set up as a defense that any bodily infirmity or disease, contributed to death. We will proceed on the contract, and the contract itself calls for or states that if the plaintiff is able to establish that death occurred solely by violent, accidental means, without any disease or bodily infirmity contributing to that death, then the beneficiary is entitled to recover under that policy.

The Court: Then submit to the jury the single issue, so far as the jury is concerned, as to whether or [14] not death resulted from the accident?

Mr. Savage: Yes, it comes within the terms of the policy and the constitution and by-laws of the defendant organization, because I understand the certificate and their constitution and by-laws are all a part of the contract of insurance, here, and then submit to the jury the sole question whether this was an accidental death within the terms of that policy of insurance.

The Court: And leave for the determination of the Court in the first instance the question as to whether there was a waiver of the various cove-

nants in the contract itself, by reason of the subsequent conduct—that is, subsequent to 1928, of the insurer in accepting the premiums?

Mr. Savage: May I confer with Mr. Lundeen before I answer that question, please?

Well, we are content to stand on the policy itself, so that the Court will not be under any necessity of deciding whether there was a waiver. We will waive it ourselves. We will strike it from the complaint, and amend the complaint in that respect.

The Court: I of course have examined these pleadings. I have gone over them a number of times, but I am not as familiar with the issues as counsel are who represent the respective parties here, but it would appear to me that before any recovery could be had or even any consideration of a recovery be taken, it is necessary to establish a modification of this contract, either express or implied, because the pleaded facts of themselves, if you take them, eliminating anything in the nature of a waiver, places the plaintiff in a position where a recovery could not be had.

Mr. Savage: Frankly, I don't understand why, Your Honor says that. The Court would have to assume that as a matter of fact the multiple sclerosis did contribute to the death.

The Court: No, I am eliminating that feature of the case entirely.

Mr. Savage: Now he is entitled to retain his membership in this organization, even though he does suffer from such a disability that he is retired from active service.

The Court: Well, there is no allegation to that effect. [16]

Mr. Savage: There is an allegation to the effect that he was a member in good standing at the time and that is admitted by the defendant. It would seem to me that would cover it, Your Honor.

The Court: Well, that is the phase of the case that is giving the Court some concern, from a hasty examination of these pleadings, I was rather led to the conclusion that when he became totally disabled from carrying on his work as a Railway Mail clerk he then and thereafter, unless there was a waiver of the provisions of the contract of insurance, was not entitled to any benefits under the contract.

Mr. Savage: I do not believe there is any such contention on the part of the defendant. I will ask him in open Court if there is.

Mr. Jarvis: What is that, Your Honor? Your Honor that is answered this way: The policy had two provisions, one gave a benefit in the event that the insured was injured through accidental means alone—a weekly benefit. The other provision gave a benefit in the event that if such injuries through accidental means alone should cause death, resulting directly, independently and exclusively of any other causes, and that disease, defect and bodily infirmity should not be the cause, but a contributing cause of the death. [17]

Plaintiff then alleges that the defendant became afflicted with multiple sclerosis and was permanently retired on July 31, 1928, as a Railway Mail clerk.

The Court: Now, did that permanent retirement, if the information had of been passed on to the insurer, the defendant, sever the plaintiff automatically under the terms of the contract?

Mr. Jarvis: No, sir, it did not.

The Court: In connection with his policy, and relieve the defendant of liability?

Mr. Jarvis: Not a permanent wholly retirement, as I understand the wording of the policy, but the plaintiff alleges in the complaint that this permanent disability and retirement and the affliction of multiple sclerosis remained permanently and continuously until the insured died on July 30, 1943; that in order to keep the policy in force he paid \$1.50 every two months and in addition thereto paid certain special assessments which we accepted, knowing that Mr. Babbitt was physically unable to perform the duties of a railway postal clerk.

Then it is alleged in Paragraph VI of the complaint that by reason of accepting those payments, we waived two parts of the policy. We waived first the part that the injury could not have resulted from accidental means alone and that disease, defect or bodily [18] infirmity could not have contributed to it—that is, the injury. Then second, it is claimed that we waived that provisions of the policy that death should be defined as caused independently and exclusively of any other causes—that is, any other causes other than accidental—external and accidental means, and that disease, defect, or bodily infirmity could not in any way be a contributing cause of death. Now it is claimed that we waived

those two provisions of the policy, and it is alleged in Paragraph IV of the complaint that the decedent—that is in the plaintiff's own complaint, it is alleged that the decedent was suffering from multiple sclerosis. Then it says in Paragraph V of the complaint that although we knew he was suffering from multiple sclerosis, we received and accepted premiums, and by reason of our acceptance of those premiums and of our knowledge that the defendant was physically unable to perform the duties of a railway postal clerk, we waived the terms of the policy and that disease, or bodily infirmity could not be the cause, but a contributing cause of the death.

Now the only theory or possibility, Your Honor, of the complaint, and of which we have been put on trial in this case, and the theory on which we have assumed that the plaintiff is proceeding, and which we could assume up until the statements made in court this morning, [19] at the time of the trial of this case, is that the plaintiff claims and admits, as a judicial admission, and as Your Honor will see by the reply in the file, which is stricken, it is true, but it is nevertheless an admission of fact and admissible as such. Your Honor will see that it is admitted, and the theory of the complaint could only be based on the fact that it is admitted that disease, defect or bodily infirmity was either a contributing cause of, one, the injury; or two, the death. If it was a contributing cause of either one, the plaintiff is not entitled to recover, unless Your Honor should decide as a matter of law that we

have waived the terms of the policy, so we have proceeded on the theory that the only issue before Your Honor, in view of the judicial waiver and the allegations of the complaint to which we have been put to trial—we have proceeded that the only issue before Your Honor is the question, if as a matter of fact, or if as a matter of law, we waived the policy. On that question Your Honor has a discretion, either if it is a question of fact to have it decided by the jury—if it is a question of fact Your Honor has the discretion to decide it yourself, and of course Your Honor has the duty to decide it as a matter of law, irrespective of any other aid or part of this court. So, it is our position, and we have been [20] put to trial in this case—it is our position that we have not waived the terms of the policy, but by reason of raising that issue in this Court, and proceeding up to the trial of this case, the defendant could only proceed on that theory, on the ground that the disease, defect or bodily infirmity was a contributing cause of Mr. Babbitt's death.

The Court: Well, but suppose the plaintiff, now, by his proffered amendment to his pleading, offers the single issue as to whether or not death occurred by reason of external accidental means, without any contributing physical ailment?

Mr. Jarvis: Well, Your Honor, he has already made a judicial admission in this very case and has put us to an answer and a trial. up to the time of the trial of this case, that the decedent came to his death; that disease, defect, or bodily infirmity was

a contributing cause of the death. Can he then go back and try that issue?

The Court: I don't quite read the pleadings in that manner. Of course I have given no consideration to this reply because it was stricken.

Mr. Jarvis: It was stricken, Your Honor, but as an evidentiary matter, it is admissible as any other judicial admission. [21]

The Court: Well, I don't even read it quite that way, Mr. Jarvis, that they admit that he came to his death by reason of his physical condition contributing to the injuries from the accident, but it is rather in the alternative. The language is stated in the alternative, that even if he did come to his death by reason of those facts, there still would be liability, and there was a modification of the contract.

I am inclined to feel that though I am perfectly willing to hear from both sides on this, that if there is a waiver as to certain limitations fixed by the terms of this contract of insurance, and the action is sought to be maintained solely upon the issue as to whether or not the deceased met with an accident, and as to whether or not, as a result of that accident, within the time limited by the policy, he died, and then the further issue, if he died as a result of that accident, and a contributing cause of his death was his then physical condition, he would not be entitled to a recovery.

Mr. Savage: We offer to proceed upon the grounds just as outlined by Your Honor.

Mr. Jarvis: Your Honor, may I take in that

connection, this exception to Your Honor's ruling, in that complaint was filed—Paragraph IV of it, alleges—Paragraph IV, of it alleges that Mr. Babbitt [22] was suffering from multiple sclerosis continuously since July 31, 1928; that he paid the dues or premiums that became due; that we accepted them knowing that he was physically unable to perform the duties of a Railway Postal Clerk; that by accepting these payments—and it is then alleged by then accepting these payments we waived the insurance agreement between Mr. Babbitt and the defendant association; that bodily injuries received had wholly and continuously disabled him from performing the occupation of a Railway Postal Clerk, and that we further waived the provision that there shall be no liability whatsoever when disease, or defect, or bodily infirmity is a contributing cause of death, because that theory of plaintiff's complaint and those allegations, can only be based on the theory that Mr. Babbitt was suffering from a disease, defect or bodily infirmity at the time of his death, which was a contributing cause of his death, and that the complaint has been filed and the answer has been filed and the case has proceeded to trial up to the present time on that theory, on which we are entitled, I believe, to summary judgment, and that by removing that issue from the plaintiff's complaint. Your Honor changes the theory of the Plaintiff's complaint entirely from one of a modification of a contract, with a waiver, to one that is purely brought—that is [23] brought and which is radically different, and in which the

plaintiff is attempting to come within the terms of the policy. In other words, having made a solemn and a judicial admission in this court—I don't say actually, but I say on the theory of the plaintiff's complaint having made a solemn and judicial admission in this court that disease, defect or bodily infirmity was a contributing cause of death, then the plaintiff can not change it, either the complaint or the trial, or the theory of her case, or the proceedings in this court to an entirely distinct one in which it is claimed that the death was caused by—that the death came within the beneficial terms of the policy. They are so inconsistent that I do not think at this time, at this stage of this case that the plaintiff can make the radical change.

The Court: I am unable to quite follow your argument there, because the plaintiff is now taking the position—and it may be that you could show that you are surprised by the position that he is suing on the contract of insurance for a death resulting from an accidental or from accidental causes, and he assumes the burden of showing that that death did result from accidental causes independent of a contributing cause as set forth in the policy.

Mr. Jarvis: My theory, Your Honor, is that they [24] have admitted that there was a contributing cause.

The Court: Well I can not find anything in the pleadings that could be——

Mr. Lundeen: Your Honor, we never admitted that in any manner whatsoever.

The Court: Even in the reply there is a statement, but it is in the alternative. It is not an admission.

Mr. Jarvis: They claim we waived the limiting clause that disease, defect, or bodily infirmity was not a contributing cause of death. We could only waive that if disease, defect, or bodily infirmity was a cause of death. Otherwise, that is outside of the complaint, and the issues that are raised. In its simplest analysis, it is that they plead that part of the contract. They plead multiple sclerosis. They do not——

The Court: But assume that they desire to make proof as to their loss under the limitations as fixed by the contract of insurance itself, and the issue of waiver does not come into the case at all, but they assume that their recovery, if they are entitled to one, is based solely upon the fact that there was an accident, followed by death; that of course, that it was independent of any contributory negligence, then the question might present itself whether the burden shifts in that regard. [25]

Mr. Jarvis: Well of course, Your Honor, we claim that the theory of the complaint is based on the waiver, and we claim that the only issue before Your Honor is whether or not there was a waiver, and that under the pleadings as they stood at the beginning of this trial, the only evidence the plaintiff could put in would be on the question of waiver.

The Court: You mean if an amendment is allowed now, striking from this complaint all allegations in reference to a waiver of the covenants of

this contract of insurance and a modification of it, and the action is sought to be maintained upon the contract liability, that then you would be so surprised that you would not be prepared to meet that issue?

Mr. Jarvis: Oh, Your Honor, I would not say I would be so surprised, no, that I would not be prepared to meet that issue, but I say that the plaintiff should not—is not entitled to introduce any evidence under the theory—under the allegations of her complaint other than the fact that there was a waiver, and I would like to know if there is. I object and except, Your Honor, to any amendment to the complaint at this time, on the grounds and for the reasons that I have stated.

I would like to know what the new complaint is if they want to draw a new contract for us, and now if [26] they want a new complaint, I would like to know exactly what the issues are.

Mr. Savage: I believe, may it please Your Honor, that counsel in all of his argument to the Court has overlooked the provisions of Paragraph VII of our complaint, which states a good cause of action under the contract of insurance, itself, and alleges that death was caused by an accident and injuries, through external, violent and accidental means, and not the result of the insured's vicious or intemperate conduct.

The Court: Well, unless you claim surprise here, I am inclined to permit the plaintiff to proceed on this complaint as amended orally here, at this time.

Mr. Jarvis: May I have an exception to Your Honor's ruling?

The Court: Yes, you may.

Mr. Jarvis: On the grounds—I won't recite them again—on the grounds of the argument that I have recited.

The Court: Yes, and then we have the question that I think now, in the absence of this jury panel, we might as well dispose of.

The plaintiff in his proof would have to, of course, show the existence of the policy, and the member or the insured being in good standing at the time of the [27] accident. He would have to show the accident and then he would have the burden of showing that the accident resulted independent of any misconduct, as set forth in the policy there, or any contributing cause to his death, and if the trier of the facts, whether it be a court or a jury, believed that then he would be entitled to a recovery. If he did not establish that fact, of course he wouldn't recover.

Now the question that I have in mind at this hour is, on whom does the burden of proof rest, as to the contributing cause of death?

Mr. Savage: Well, it is going to be our position that the burden of showing that death came within any of the provisions or the exceptions in the policy, rests upon the defendant company; when we once show an accident and the death, then we have made a *prima facie* cause.

The Court: But you must show that death followed as a result of the accident.

Mr. Savage: Yes, I should have said that, Your Honor please. Thereafter, I think the burden shifts upon the defendant association to establish by a fair preponderance of the evidence that there was a contribution to that death by reason of some other disease or some bodily condition, and I think the authorities are [28] practically uniform in holding that way, Your Honor.

Mr. Jarvis: Your Honor, I would say that by far the great majority of authorities are to the contrary, and that it is not only upon the plaintiff to prove that the allegations of their complaint and I would like the issues that we have to meet—I would like to know definitely what they are before we go to the further part of this trial—the burden is not only on the plaintiff to prove the allegations of the complaint, but the burden is upon the plaintiff to show that they come within or without the limiting or the excepting clauses of the policy.

(Whereupon, argument by respective counsel).

The Court: The problem,—first you have a contract here that has a provision in it that when there is a death, if some physical defect, or ailment of the insured was a contributing factor, then you would not be entitled to recover. This contract provides that.

Then you have an allegation in your complaint that even remains with your amended complaint, that there was a physical ailment of sufficient significance to require a retirement from the Railway Mail Service.

I am rather inclined to believe that this case is readily distinguishable from what we have ordinarily [29] in the negligence case where there is an allegation of negligence, and there is an answer affirmatively alleging contributory negligence, the burden is on you to show, before you are entitled to recovery, not only this accident but that death resulted from it, and even though the deceased was suffering from the ailment set forth here, the ailment itself would not have caused the death, but neither did the ailment bring about death as a result of the accident, or the injury.

Mr. Savage: Well, is Your Honor finally ruling on it now, or may I, during the noon hour——

The Court: My purpose is, in raising it now, for the purpose of passing upon the other question as to whether or not I should call a jury, and if jury is called, in view of the amendment in the pleadings, I do not think that a jury would be sitting in an advisory capacity.

Mr. Savage: No, I agree with Your Honor.

The Court: I think their decision on the facts would be binding upon the Court, and since the issue of waiver is removed from this case, then we have the single issue of law as to whether there is liability under this contract of insurance, and that is a proper issue to be tried by a jury.

The only reason that there would not be a [30] jury here is that you did not comply with the Federal Rules of Civil Procedure in making a jury demand within the time limit, though your jury demand was made at about the same time that your

reply was filed, but a reply is not a necessary pleading under Federal procedure, and the question as to whether or not, under those circumstances, a jury should be granted or denied, I take it, is one within the discretion of the Court, because the rule is not a mandatory rule. It is a discretionary rule, and I am inclined to grant a jury for the purpose of disposing of these issues as now limited, and your complaint as I understand it, would now read, at least in a general way, it would contain the allegation that you have in Paragraphs I and II, and III, and IV I assume would be stricken.

Mr. Savage: I believe so, Your Honor. That would be our motion.

Mr. Jarvis: May I take an exception to the ruling striking Paragraph IV, Your Honor?

The Court: Yes.

Mr. Jarvis: Without repeating my argument on it?

The Court: Yes, you may have an exception.

Paragraph V would still remain in your amended complaint. [31]

Now, is there any objection on the part of either of the parties to that ruling?

Mr. Savage: I think probably Paragraph VI should be stricken.

The Court: But as to Paragraph V?

Mr. Savage: No objection on our part.

The Court: Paragraph V alleges there was this ailment, but it alleges payments, the contract was in good standing.

Mr. Jarvis: Does that remain, in, Your Honor?

The Court: Yes.

Mr. Jarvis: I have no objection.

The Court: Paragraph VI would be stricken.

Mr. Jarvis: May I have an exception on the order striking Paragraph VI, for the reasons I stated in my argument?

The Court: Well, if there is something in that paragraph that goes beyond the question of waiver, I would like to have you point it out to me.

Mr. Jarvis: I don't like to commit myself, Your Honor, but I don't see any.

The Court: Well, now then, as to Paragraph—

Mr. Jarvis: From a cursory reading——

The Court: As to Paragraph VII, that will remain, and Paragraph VIII, it just deals with the matter [32] of making proof.

Mr. Jarvis: That will remain?

The Court: That will remain, and Paragraph IX will remain.

Now your answer, of course.

Mr. Jarvis: Our answer is a general denial, Your Honor. Legally it is.

Mr. Savage: Doesn't it go further than that?

The Court: Well it is an admission, of course, as to the execution of the insurance contract and the existence of the insurance contract.

Mr. Jarvis: That is admitted, Your Honor.

The Court: And the payments, and I think we have thus simplified the issues substantially, now, and I want to offer to the defendant, again, the opportunity, if he sees fit to do so, to claim surprise by reason of the narrowing of the issues.

Mr. Jarvis: Well, I will say this, Your Honor, that we are not surprised, because——

The Court: Surprised to such an extent as to justify you in moving for a continuance of the case.

Mr. Jarvis: I will say, Your Honor, we were ready to try this case—perfectly ready to try it. We are ready to try it on the theories advanced on plaintiff's complaint. We consider the present theories a radical [33] departure from the theory on which we were prepared. Outside of that element, I do not believe that there is a great deal that would justify us in asking Your Honor, conscientiously asking Your Honor for a continuance.

The Court: I think we will take a recess now for ten minutes, and then you will bring the jury in following that. [34]

JENNIE M. BABBITT,

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Savage:

Q. Mrs. Babbitt, tell the Court and jury your full name. A. Jennie M. Babbitt.

Mr. Savage: Will you speak up so the jury and counsel for the defendant can hear you? Speak up clearly.

(Testimony of Jennie M. Babbitt.)

Q. And where do you reside, Mrs. Babbitt?

A. Well—— [47]

Q. Where do you live?

A. I really have no home. I have rented a room, and——

The Court: What I want is the address.

A. (Continuing) ——I give my daughter's address as a permanent address, which is 7117 12th Avenue Northeast.

Q. Are you the widow of Fred I. Babbitt, deceased?

A. I am.

Q. And when did Fred Babbitt die?

A. July 30, 1943.

Q. And where were you living at that time?

A. 4116 Corliss Avenue.

Q. Seattle? A. Seattle.

Q. When were you and Mr. Babbitt married?

A. June 18, 1902.

Q. And where? A. In Abilene, Kansas.

Q. Abilene, Kansas? A. Abilene, Kansas.

Q. That is the General's home? A. Yes.

Q. And ever since your marriage, were you husband and wife, up until the time of his death?

A. Yes.

Q. The bonds of matrimony had never been severed between the [48] two of you? A. No.

Q. And were any children born as an issue of that marriage?

A. We have three children.

Q. And who are they, please?

A. Well Frederick, the oldest one has been in

(Testimony of Jennie M. Babbitt.)

Germany 37 months and is still there. Ardley, my daughter, is in the court room.

Q. Ardley Pettit, is that her name?

A. Ardley Pettit, and Eugene, the youngest son, is in Los Angeles.

Q. Now when did you and Mr. Babbitt remove to the city of Seattle?

A. In 1902. We came right here from Abilene, on our honeymoon.

Q. Now what was Mr. Babbitt's business or profession at the time you two were married?

A. He was a railway mail clerk before we were married, and up until the time of his retirement.

Q. And do you know how long prior to your marriage he had been a railway mail clerk?

A. I couldn't say exactly. He went in in April—it was either 1898 or 1899.

Q. And to the best of your knowledge was he a member in good standing of that organization from 1888 to 1899, up to [49] the time of his death?

A. Yes. [50]

Q. Now during your married life, up until the time of Mr. Babbitt's retirement, state whether he had ever suffered from any illness, Mrs. Babbitt?

A. He had never missed a day's work. He had never asked for——

Mr. Jarvis: Just a minute, you just answer the question.

The Court: The question is, did he?

Q. Had he ever suffered from any operations?

A. No.

(Testimony of Jennie M. Babbitt.)

Q. Had he ever missed a day's work?

A. No.

Q. That is, from the time you two were married up until the time of his retirement, is that right?

A. Yes.

Q. Now, he did retire from the Railway Mail Association—do you know when?

A. Well, it was—I don't know just when the official action went through, but it was in the spring of 1928.

Q. And after his retirement do you know whether he kept up the payments of his dues and assessments to the Railway Mail Association?

A. Yes, very religiously.

Q. And do you know what the amount of the dues were, annually?

A. Well, it was \$3.00 every two months, with very many extra [52] assessments.

Q. Now the dues themselves amounted to \$18.00 a year?

A. Yes.

Q. And in addition to the dues were there assessments?

A. Yes.

Q. And do you know what those assessments amounted to per year, approximately?

A. Well, it seemed about every other time it would be \$6.00, instead of three. I haven't those receipts to verify that?

Q. You don't?

A. No.

Mr. Jarvis: We have them, Mr. Savage.

Mr. Savage: All right.

(Testimony of Jennie M. Babbitt.)

Q. Now, do you recall the morning of July 9, 1943? A. Yes.

Q. Had there been any change in the condition of Mr. Babbitt's health for—say several weeks prior to that morning? A. None.

Q. Now, what occurred on that morning, Mrs. Babbitt? A. Well, we were——

Mr. Savage: A little louder, please, we so can all hear.

A. Well, it was July 9th, and he would have been 70 years [53]

Q. Now, just what occurred, that particular morning?

A. Well, we both got up about the same time.

Q. Where were you?

A. We were in the bedroom.

Q. In your family home?

A. In the family home, and he was—he had a chair that faced the bed, such as you might face the bed here (illustrating), and I was sitting in the chair.

Mr. Savage: Now let me interrupt you. When you say “here”, the reporter is not able to get down the [54] distance, or the way the bed ran.

Q. Now, in what direction did your bed run?

A. It ran from west to east.

Q. West to east. Now was it in a corner, or was it out from the corner?

A. It was out from the corner. He was facing—the bed facing south, and I was to the left of

(Testimony of Jennie M. Babbitt.)

him, which would be the east, about six feet, difference.

Q. Well, now, were you both on the west side of the bed? A. Yes.

Q. Tell the Court and the jury whether you were able to see what occurred?

A. No, we were both on the north side of the bed.

Q. North side of the bed? A. Yes.

Q. And were you able to see what occurred at that time and that place? A. Oh, yes.

Q. Now tell the Court and jury exactly what happened.

A. Well, I had just finished dressing. I was sitting in this chair, not more than six feet away, and he had stood up and pulled on his long underwear before he stood up, and then as he—after he stood up—should I show you?

Q. Yes, stand right up.

A. As he stood up this way (illustrating), facing the bed to [55] pull on the arms of the long underwear, he turned this way (illustrating) to get the sleeve in on the first side. The rug was loose at that corner on the polished floor, and I saw him slip on the rug just as if it was taken out from under his feet. He fell full length, without any support or help, or anything—just fell full length. He was in very great agony.

Q. Now let me ask you what part of his body struck the floor?

A. Well his hip struck the floor.

(Testimony of Jennie M. Babbitt.)

Q. Which hip, right or left hip?

A. It would be the left hip.

Q. Would you say that was a slump, or slip, or a fall?

A. No, that was a fall, that the rug slipped out from under his feet.

Mr. Jarvis: Just a minute, I object.

Q. Did you see the rug slip?

A. I saw the rug slip. I saw his feet twist on the rug. The rug was loose on that corner. I saw him fall.

Q. All right then, what did you do after he had fallen?

A. Well of course I rushed to his side, and he was in very great agony, and he said "oh", his leg was broken—his leg was broken.

Mr. Savage: Talk to the jury so they can hear you, please. [56]

A. (Continuing) And so I said "oh". I thought perhaps it was just bruised. I rushed to the bathroom and got a cloth of cold water to put on his forehead, and then tried to lift him and I couldn't lift him, and there was a roomer just across the hall, and——

Mr. Savage: A little louder, please, Mrs. Babbitt. I can scarcely hear you.

A. (Continuing) We rented a room to a man just across the hall. There was four bedrooms in the house. This was just across the hall to the left. I rushed there and knocked on the door, and I think it was Mr. Webber, and asked him to come and help

(Testimony of Jennie M. Babbitt.)

me get Mr. Babbitt in bed, he had a terrible accident, and he mostly lifted him and put him in bed. He was just ready to leave for work, and left immediately.

Q. Do you know where Mr. Webber is now?

A. He was in Denver. He was in the Port of Embarkation. He has gone back there, to the best of my knowledge.

Q. Now tell us whether there was any change in color on Mr. Babbitt's face?

A. Oh, yes, he was deathly pale.

Q. And did you have a look at his leg or his hip after he had been put into bed?

A. Yes, I put the electric hot pad on it.

Q. Did you notice any difference in shape or alignment of his [57] leg?

A. It was more of alignment. It looked crooked.

Q. It looked crooked to you. Did you notice any bumps or bruises on his body, or his arms, or his face?

A. No, not that I remember.

Q. After that, did you call your daughter, Mrs. Pettit, to come to your place?

A. Yes, I rushed downstairs and I called my daughter and told her her dad had had a terrible accident.

Mr. Savage. You are not permitted to say what you discussed with your daughter.

Q. Did she come to the premises?

A. She came at once.

Q. What occurred after Mrs. Pettit arrived?

A. Well, he insisted on getting up. He said "I

(Testimony of Jennie M. Babbitt.)

haven't spent a day in bed yet, and I am not going to begin now," and he insisted on getting up, and much to our protest, why, we helped him and he got up on a chair, and then he fainted completely. He was in a dead faint, and we two were able to get him back in bed.

Q. What can you say as to his color when he fell into a faint?

A. He was very gray,—just death-like.

Q. Now what occurred after he was put back into bed by you and your daughter, Mrs. Pettit?

A. Well, my daughter says, "Well, I am calling the doctor." We knew that Doc Palmer did not go out to the house.

Mr. Savage: I do not think you are entitled to detail a conversation that way.

Q. Now, just what did occur, Mrs. Babbitt?

A. Well, I called Doctor Palmer and I described to him what had happened, and he said, "Well, it sounds like a broken hip. I will have the ambulance there in twenty minutes," and he did.

Q. And what was done with Mr. Babbitt?

A. He was put on a stretcher and taken out by the ambulance service, and I rode with him in the ambulance to the Seattle General.

Q. And what was done with him, if you know, after he was taken in to the Seattle General?

A. Well, I went with him to the X-ray room and he was put out on the table where they take X-rays, and I stayed right beside him.

(Testimony of Jennie M. Babbitt.)

Q. You were there when X-ray pictures were taken of him?

A. I was there when X-ray pictures were taken of him.

Q. What else did you see or witness?

A. I saw the X-ray pictures as soon as developed. He did not want to go home——

Mr. Jarvis: If the witness will confine herself to the question. [59]

Mr. Savage: All right, we will try to keep within the limits.

Mr. Jarvis: I don't want to make objections——

Mr. Savage: I understand, Dave. Neither do I.

Q. Now you say you saw the X-ray pictures after they were developed? A. Yes.

Q. And was the meaning of those pictures explained to you?

A. Well, they were not only explained, but they were visible.

Q. Now, what was done with Mr. Babbitt after that?

A. Well, he was taken up to the second floor and put in a bed—a hospital bed.

Q. And now was his leg and hip—leg or hip, or both, ever placed in a cast?

A. The next morning at 8:00 o'clock Doctor Palmer and his son operated on him and put him in this—what they call a traction splint.

Q. That is Doctor Don Palmer and Doctor Rex Palmer? A. Yes, sir.

(Testimony of Jennie M. Babbitt.)

Q. Were you there when that operation was performed?

A. Yes, sir, I was in the hospital. I was not in the operating room.

Q. Did you see him after the leg and hip had been placed in [60] a traction cast?

A. Yes, just as soon as he came downstairs and put back in bed, I saw him immediately.

Q. Did you see the cast?

A. I saw the cast.

Q. What else did you see about, or around, or appertaining to the cast?

A. Well, there was a spike driven between each leg and this big square frame put on between—or on the ends of his feet, and Doctor Palmer explained to me how they would screw up on one side or the other, in order to pull it.

Q. All right, now, you did see the frame, the cast and the spikes driven through the two legs—you saw that yourself?

A. I saw that.

Q. And did you visit Mr. Babbitt while he was in the hospital?

A. I was there every day, and most of the day.

Q. And what was his condition for four or five days?

A. Well, he was in very good spirit when he came down from the operating room. He was in surprising good spirits, and the doctor said that he had been bantering and joking and talking all through the spinal anesthetic, all during the operation.

(Testimony of Jennie M. Babbitt.)

Q. And how long did that condition continue, Mrs. Babbitt? [61]

A. Well, he was not so well on Sunday. This happened Saturday morning. He was not quite so well on Sunday, and on Monday not quite so well. We brought down all his birthday presents, but he was not interested, and——

Mr. Savage: Just take your time, now.

Q. When was it, Mrs. Babbitt, when you noticed a decided change in his condition, if you did notice such a change?

A. Well, he got better after Monday, and on Tuesday or Thursday, I brought to him this application for accident insurance.

Q. Now, did you give any notice to any of the officials of the Railway Mail Association that he had suffered an accident?

A. Yes, I called up Mr. Matthews, the treasurer, and told him about the accident, and he sent me the papers to fill out for the accident, with the Doctor's description.

Q. Yes. All right, now, you say you took those papers down to your husband at the hospital?

A. Yes, I took them to him and I wrote out what had occurred and he signed it. He was laying on his back, of course.

Mr. Jarvis: Just answer the question, if you will, Mrs. Babbitt.

Mr. Savage: Go right ahead, Mrs. Babbitt.

A. And he signed it, and then I took it to Doc-

(Testimony of Jennie M. Babbitt.)

tor Palmer [62] for his part of filling in the description of the accident.

Q. All right. Now coming back to Mr. Babbitt's condition, did you at any time notice any decided change in his condition?

A. Well, Saturday morning at 8:00 o'clock Doctor Palmer called me up and he says, "Something has happened, we don't know what it is, and you come down at once."

Mr. Jarvis: Your Honor, I don't want to object—

Mr. Savage: I have no objection that be stricken.

The Court: We want questions and answers, and I want to be as liberal as possible in eliciting the facts. You should be as careful as possible in answering the question.

Q. Did you go down to the hospital Saturday morning?

A. Yes, sir.

Q. And what time did you arrive?

A. Well, as soon as I could get there, between 9:00 and 10:00.

Q. And what was Mr. Babbitt's condition at that time?

A. He couldn't open his eyes or speak.

The Court: Now, was that the Saturday following the accident, or a week later?

Mr. Savage: Just a week later. [63]

Q. You say he couldn't open his eyes, or speak?

A. No.

Q. Well, did he get any better from that condition, or did he get worse?

(Testimony of Jennie M. Babbitt.)

A. He grew steadily worse.

Q. And on what day did he die?

A. July 30, just three weeks to the day after the accident.

Q. Were you there at the time?

A. I was not at the hospital at the time of his death.

Q. Now in addition to his—I believe you testified to his inability to open his eyes or to speak. Did he have any other physical difficulty which you observed?

A. Well, he couldn't feed himself. I went down to feed him every meal.

Q. He couldn't feed himself. What about his breathing? Did you notice anything about his breathing?

A. Well, after this Saturday, why then his breathing became very harsh, and——

Q. What about the rapidity of the breathing, did you notice any change in how fast he breathed?

Mr. Jarvis: Your Honor, the witness is not an expert witness. I object to the question.

The Court: I think she may answer.

Mr. Savage: It does not take an expert to count respiration. [64]

A. Well, he was laboring under——

The Court: Talk to the jury now.

A. Well, he was laboring under very great——

Q. Answer my question, did you notice whether he breathed fast or not?

A. I noticed a laboring breath.

(Testimony of Jennie M. Babbitt.)

Q. You noticed a laboring breath?

A. Yes.

Q. You did not count the respiration, in order to tell whether he was breathing fast or not, is that right? A. Yes.

Q. Now, after Mr. Babbitt's death, did you notify any of the officers of the Railway Mail Association that he had passed away?

A. I don't remember whether I did or not.

Q. Well, directing your attention specifically to one individual, did you or did you not notify Mr. Chaplin that your husband had passed away?

A. I saw Mr. Chaplin on Sunday, and I don't know whether I saw him on Saturday or not.

Q. Well, I mean at any time after his death, whether it was Saturday or Sunday, or a day or two later. Did you notify any officer that your husband had died?

A. I don't know, I don't remember.

Mr. Savage: You don't remember that. [65]

Mr. Jarvis: I have the record on it here, and I will take off the part that relates to the rejection of the claim.

Mr. Savage: We allege in Paragraph VIII of the Complaint:

"Within sixty days after the death of Fred I. Babbitt, the plaintiff, as beneficiary under the said certificate, notified G. K. Chaplin, the branch president of the defendant, of the death of Fred I. Babbitt, and filed her proof of claim on the forms provided by the defendant, which the Committee of

(Testimony of Jennie M. Babbitt.)

Claims of the defendant disallowed. Thereupon, the plaintiff appealed to the National Executive Committee of the defendant, and on October 21, 1943, by a vote of seventeen to two, the defendant rejected the claim of the plaintiff and so advised her."

Defendant in his answer says:

"Answering paragraph eight, admits the allegations therein contained."

The Court: Yes, I think that is correct. Of course there is no need to make proof on that.

Q. Then I ask you if you did, prior to the time that this action was instituted, receive any money from the defendant Railway Mail Association, as beneficiary on the [70] policy of insurance?

Mr. Jarvis: What was your Honor's ruling on that last——

The Court: Upon the preceding one, there is no need to make proof on it, because that is not an issue.

Mr. Jarvis: There is no need to make proof?

The Court: On the fact that a claim was filed within the sixty days, and that the claim was rejected. Proof of claim was submitted and the Committee on Claims of the defendant disallowed it, and then the defendant appealed to the national Executive Committee of the defendant, and on October 21, 1943, by a vote of seventeen to two, the defendant rejected the claim. Now that is admitted in the answer.

Answering paragraph eight—I am reading from

(Testimony of Jennie M. Babbitt.)

the answer now—admits the allegations therein contained.

Mr. Savage: Now, will you answer my question as to whether you ever received a payment of four thousand dollars or any part thereof, from the Railway Mail Association on this beneficiary certificate?

A. No.

Q. How long have you known Mr. Chaplin?

A. I never saw him until he came to the house at the time of my husband's—just before the funeral. [71]

Q. Do you know whether he held any office in the Seattle branch or division of the Railway Mail Association at that time?

A. He told me at that time that he was president.

Q. And how long have you known Mr. Matthews? A. Well, a good many years.

Q. Well, when you say “a good many,” that means something to you and something else to the jurors. A. About twenty-five.

Q. About 25 years, and do you know whether he held any office in the Railway Mail Association in the Seattle branch or division?

A. He was treasurer.

Q. And do you know for how long a period of time he held that office?

A. I don't know the period of time.

Q. Did Mr. Matthews, after your husband had retired from the railway mail service, visit——

A. He did.

Q. (Continuing): ——your husband in your

(Testimony of Jennie M. Babbitt.)

home. Did he on those visits ever collect any of the dues or assessments which had been levied by the Railway Mail Association? A. He did.

Q. He did, and did you, yourself, on other occasions pay these dues and assessments? [72]

A. I never paid them.

Q. You never did. Did you ever take Mr. Babbitt to the office to pay them?

A. My son took him to Mr. Matthews' home.

Q. I see. Now after Mr. Babbitt's death, state whether Mr. Chaplin came to your home to investigate the circumstances of the alleged fall and accident?

Mr. Jarvis: Just a minute, your Honor, I object to the form of the question as incompetent, irrelevant and immaterial.

The Court: Objection will be overruled, exception allowed.

Q. Did Mr. Chaplin come to your home to talk to you about the circumstances of the alleged accident? A. Yes, he and another man.

Q. And do you know who the other man was?

A. I think it was Mr. North, but I had never seen him before.

Q. And how long was that after your husband's death?

A. Oh, it was within a week. I don't know the exact time.

Q. And what was said between you and Mr. Chaplin at that time?

A. He said he wanted to see the conditions. I took him up the stairs—— [73]

FRANK W. FELLOWS,

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Savage:

Q. Will you tell the Court and jury your full name? A. Frank W. Fells.

Q. Frank W. F-e-l-l-s? A. Right.

Q. And what is your business, Mr. Fells?

A. Business manager of the Seattle General Hospital.

Q. And how long have you been the business manager of the Seattle General Hospital?

A. Going on fourteen years.

Q. Fourteen years? A. Yes.

Q. And in your capacity as general manager of that hospital, are the hospital records under your general supervision? Do you have general custody of them? A. Yes, sir.

Q. Now in response to a subpoena duces tecum, have you brought with you X-rays and clinical reports—that is, the clinical reports and X-rays appertaining to Fred I. Babbitt? [77]

A. Yes I have.

Mr. Savage: May I have them, please?

Q. These are a part of the permanent records of the Seattle General Hospital?

A. That is right.

(Testimony of Frank W. Fells.)

Q. And are kept in the regular course of your business as a general hospital, is that right?

A. Yes, sir.

Q. Now you don't know anything about the details of the exhibit, what they contain—that is, you did not write them up or take the X-ray pictures, is that right?

A. Yes, sir.

Mr. Savage: You may cross-examine.

Cross Examination

By Mr. Jarvis:

Q. You have no personal knowledge of the contents, Mr. Fells?

A. No.

Q. You don't know what doctors or technicians prepared those, do you?

A. No.

Q. You just took them out of the file in the hospital?

A. I had the record clerk in charge take them out.

Q. You did not do it yourself? [78]

A. No.

The Court: As I understand, you have offered them?

Mr. Savage: Not yet, no. That is all.

(Witness excused.) [79]

JENNIE M. BABBITT,

recalled as a witness on behalf of the Plaintiff, was examined further and testified as follows:

Cross Examination

Q. Well, how many times a month would he have difficulty?

A. Well, I don't know as it was ever regularly established.

Q. Did he have difficulty walking?

A. Yes.

Q. Was he able to put his foot down where he wished to place it?

A. Yes, he could always stand up and balance himself. This was not evident at the beginning, but it was the last few years. He could always stand up and balance himself, but before he started to walk he would put his hand on something to balance himself as he walked.

Q. In other words, during the last few years of his life, before he took a step he had to have some support?

A. When he started to walk, but he was never helpless.

Q. Well, I am not asking whether he was helpless or not. I am asking about this walking difficulty. Could he walk up and downstairs without assistance?

A. Well, he took ahold of the bannister. He walked up and down the stairs night and morning, and through the house—four rooms, back and forth to his meals, and to the front porch.

(Testimony of Jennie M. Babbitt.)

Q. But when he took a step did he have to take ahold of the bannister, or the wall, or the side of something to assist him? [87]

A. Yes, after he would stand up and balance himself, in order to walk he would have to put his hand on a chair or on a table to walk.

Q. So he couldn't take any step at all without assisting himself?

A. Oh, yes, he could take a few steps, but he couldn't walk across the room without, as I say, putting his hand from the table to the chair, and walking across, but he was never helpless.

Q. Did his legs bother him by shaking, or——

A. No, he had no pain whatever.

Q. I am not asking you about pain. I am asking, did they shake at times?

A. Well, I don't know as you would call it that they would shake. It was the instability in walking. When he started to take a step he would have to put his hand out to assist him.

Q. They were unsteady?

A. When he walked.

Mr. Savage: Just a moment, I object. She did not say that. That was not her testimony. That was the testimony of counsel.

The Court: She can answer "yes" or "no."

Q. And how long had that condition been most pronounced before his death, Mrs. Babbitt? [88]

A. Well, I suppose the last eight to five years that he had been in that condition.

DR. DON H. PALMER,

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Savage:

Q. Your name is Doctor Don H. Palmer?

A. Yes, sir.

Q. And where do you reside, Doctor Palmer?

A. Seattle.

Q. And what is your address?

A. 6956 55th Avenue South.

Q. And you have been duly and regularly admitted to practice medicine in the state of Washington?

A. Yes, sir.

Q. And where is your office?

A. In the Medical Arts Building, Second and Seneca Street.

Q. Are you a member of any of the boards of our Seattle hospitals?

A. Yes, sir.

Q. Which ones?

A. Well, I work in all the hospitals, but I work principally in the Seattle General Hospital and on the staff of several hospitals here.

Q. Have you any specialty, Doctor? [91]

A. General surgery.

Q. And do you, or do you not also specialize in plastic surgery?

A. Yes, sir.

Q. Have you had any special experience in the matter of treating wounds and injuries?

A. Well, I think I have had more than the average individual.

(Testimony of Dr. Don H. Palmer.)

Q. Well, were you not for a long time, and are you still not, shall we say, consulting physician and surgeon for the University of Washington?

A. That is a hobby I have had for many years.

Q. You treat the young men out there for the injuries they sustain in their athletics, is that not right?

A. For forty years I have been doing that.

Q. Do you know the plaintiff, Jennie Babbitt?

A. Yes, sir.

Q. For how long have you known her?

A. Well, since about the time I started to practice medicine.

Q. How long ago was that, Doctor?

A. 1903.

Q. And did you know her husband, Fred Babbitt?

A. Very well. He was my landlord when I first started to practice medicine.

Q. You say he was your landlord when you first started to practice medicine? [92]

A. Yes, sir.

Q. Were you or were you not their family physician? A. Yes, I was for many years.

Q. Do you recall, Doctor, or are you able to tell now, when you were first called upon to treat Fred Babbitt for any disease or disability?

A. Well, it was some time prior to 1926. I have a record that goes back to 1926, and I did not have time to look up anything before that time.

Q. And are you able to tell the Court and jury

(Testimony of Dr. Don H. Palmer.)

for what disease or disability you treated him at that time? A. Yes, sir.

Q. And what was that disease or disability, in your opinion, Doctor?

A. He was having some muscular weakness in his legs—having some disability in doing his work as a railway postal clerk. He was complaining of loss of power control, particularly of his legs. This was dated February——

Mr. Savage: Just a moment.

Mr. Jarvis: Are you reading from something?

A. I was just getting the date here.

Mr. Jarvis: Could I ask you what you were reading from?

Mr. Savage: He said he was just getting the date. [93]

Mr. Jarvis: That is true.

A. I don't need it.

The Court: Doctor, tell counsel what you hold in your hands, since he inquired.

A. It is my own office record.

Mr. Jarvis: That is all I wanted to know.

The Court: You may use that.

Mr. Savage: Proceed, Doctor. If you want to use that to refresh your recollection, you may do so.

A. (Continuing): He had been in prior to February, 1926, for small things, but, as I say, I did not look up that record. This record is dated February, 1926, and at that time he was complaining of loss of power and control of his legs. He

(Testimony of Dr. Don H. Palmer.)

said that it had been developing for the past six months.

Mr. Jarvis: Just a little louder, please.

A. (Continuing): He said it had been developing for the past six months.

Mr. Jarvis: That was in '26, you say?

A. That was in 1926, February. He walked with his feet quite wide apart—had a rather spastic gait.

Q. Now when you say “a rather spastic gait,” what does that mean?

A. Well, that is a peculiar gait. When he moved his feet he would move them rather rapidly when he walked, with his [94] feet wide apart, much like this (demonstrating), as one will walk if they are—if they tend to be at all uncertain.

Q. What would you say with respect to his stability, Doctor?

A. He was perfectly stable.

Q. Now, did you diagnose his disease or disability at that time?

A. Yes.

Q. And did you testify as to what it was?

A. Yes.

Q. What was it, Doctor?

A. It was a sclerosis of the cord.

Q. Sclerosis of the cord?

A. The spinal cord, yes.

Q. Would that be a multiple sclerosis?

A. Yes, it comes under that heading.

Q. Now, Doctor, as a result of that disease or disability, do you know whether he retired from active service as a railway mail clerk?

(Testimony of Dr. Don H. Palmer.)

A. Yes, he did.

Q. Do you know, Doctor, whether he made a claim upon the Railway Mail Association for disability due to an accident at that time?

A. I don't recall that particular thing.

Mr. Jarvis: Your Honor, I think the record [95] better go in evidence if the Doctor is going to read from it, which he has been up to the present time.

Mr. Savage: I had not noticed he read from it.

Mr. Jarvis: I ask that the record be put in evidence.

The Court: There may be some matters in the Doctor's notes that would not be relevant. I would hesitate to make a ruling that he should submit——

Mr. Jarvis: I ask if he is going to testify from it that it be put in evidence so we will be permitted to look at it.

The Court: He has a right to use his notes for the purpose of refreshing his memory, and you would have a right to look at them to see whether he was refreshing his memory, but I do not think they would be an exhibit in the case.

Mr. Jarvis: Unless they are material.

Mr. Savage: Well, that will be a part of counsel's own case.

Mr. Jarvis: I ask that we be permitted to look at them at a convenient time.

The Court: If he reads from them.

Mr. Jarvis: He already has.

Mr. Savage: That is a matter we deny. [96]

(Testimony of Dr. Don H. Palmer.)

Mr. Jarvis: Well, he just did it a little while ago, your Honor.

The Court: He fixed the date—he used the record for the purpose of fixing the date, and it is your contention that the record is wrong, or——

Mr. Jarvis: No, it is not my contention. If he is testifying from the record, your Honor, we ought to be able to look at it.

The Court: Of course it is not such a record as would be admissible in evidence of itself, because it is a private memorandum or notes of the physician in the keeping of a history of his patient, and if there is some particular phase of it that he refreshes his memory from, and you want to see the notes on that, the Court will permit that. Let's proceed.

Q. Doctor, coming down to the date of July 9, 1943, did you see Fred I. Babbitt that day?

A. Yes.

Q. Where? A. Seattle General Hospital.

Q. Do you know how he got to the Seattle General Hospital? A. Taken in an ambulance.

Q. And do you know who sent for the ambulance? A. Pardon.

Q. Do you know who sent the ambulance out there? [97]

A. Oh, no, that would be a technicality. Anybody could 'phone for an ambulance.

Q. And did you examine him at that time?

A. Yes.

Q. And of what did the examination consist, Doctor?

(Testimony of Dr. Don H. Palmer.)

A. General examination. He was complaining of trouble in his hip.

Q. And did you have an X-ray picture taken of the hip? A. Yes.

Q. And after examining him and consulting all the information you received—looking at the X-ray, did you make a diagnosis of his disability? [98]

A. Yes.

Q. And what was that diagnosis, Doctor?

A. Fracture of his hip.

Q. Now, what was done? What treatment was given him?

A. Well, we reduced his fracture and put him in what is known as a well leg splint.

Q. Doctor, I am not familiar with a well leg splint, but describe it for us, please.

A. Well, it is a mechanical apparatus that is devised to create a pull on the injured leg, and in order to get that pull from the injured leg, the well leg is put in a splint so that the knee will not bend. If you had a blackboard I could perhaps draw it better than I can explain it, but—if I can borrow somebody's fingers here, maybe I can show you what I mean.

Q. Sit there and draw it for us, Doctor.

Mr. Jarvis: Your Honor, I don't know how this is going in the record.

Mr. Savage: We will mark it on the paper.

A. I will take your hand.

Q. Show me, Doctor.

(Testimony of Dr. Don H. Palmer.)

Mr. Jarvis: Your Honor, may I interrupt? How is this exhibit going in the record?

The Court: Well of course it can't except by word description, but then of course he can demonstrate—the [99] Court will permit him to demonstrate it, because, after all, this is not the crux of this case.

A. Now, we will say we want to get a pull. [100]

Q. Now, Doctor, were you able to get a good reduction of the fracture? A. Yes.

Mr. Jarvis: Your Honor, I object to that as hearsay.

The Court: Objection will be overruled.

Q. Now, Doctor, did you arrive at any conclusion as to the cause of death? A. Yes.

Q. What in your opinion did cause the death of Fred I. Babbitt? [104]

A. He died from a fractured femur with complications. [105]

Q. Well, Doctor, tell the Court and Jury whether in your opinion—whether or not Fred I. Babbitt died of a fat embolus which went to his lung and his brain?

Mr. Jarvis: Your Honor—just a minute, I object to that question on the ground that the witness is not permitted to testify as to the matter that must be decided by the jury, and that has been so decided.

The Court: Objection will be overruled. [107]

Q. Now, Doctor, assume that Fred I. Babbitt was suffering from multiple sclerosis, or a transverse myelitis, and he had had an accidental fall,

(Testimony of Dr. Don H. Palmer.)

with a fracture of the femur, and a terminal death due to a fat embolus going to the lung and the brain, in your opinion, would the multiple sclerosis or transverse myelitis be a contributing cause of death? A. No. [108]

Q. If Fred I. Babbitt had never been afflicted with multiple sclerosis or transverse myelitis, and he had sustained a fall in which the large bone, or femur was fractured—sustained a comminuted fracture, which is broken up—in your opinion would death have probably resulted anyway?

A. Yes. [109]

Mr. Jarvis: I ask that that answer be stricken, your Honor, on the same grounds. I want to preserve that record.

Mr. Savage: You may cross examine.

Cross Examination

By Mr. Jarvis:

Q. Doctor, you say that—or you gave your opinion that a fat embolus to the brain or the lungs——

The Witness: Just a little louder, please.

Q. (Continuing): I say, you gave your opinion that a fat embolus to the lungs caused Mr. Babbitt's death.

A. A fat embolus would not go directly to the brain. It would go to the lungs, and secondarily from the lungs the embolus would go to the brain.

Q. Now, did you see that fat embolus yourself?

A. No.

Q. Did you see it—any evidence of a hemorrhage in the brain? A. No.

(Testimony of Dr. Don H. Palmer.)

Q. Did you see any evidence of a hemorrhage in the lungs? A. No.

Q. You can't tell of your own knowledge that a hemorrhage to the lungs or a hemorrhage to the brain caused the death? A. Oh, yes, I can.

Q. And then it customarily becomes worse?

A. No, they usually die of some intercurrent disease.

Q. Does the multiple sclerosis contribute to the death? A. Not necessarily.

Q. Does it weaken a person?

A. Does it what?

Q. Does it weaken a person?

A. Yes, it weakens them as far as certain muscular efforts are concerned.

Q. Does it make them more susceptible to death by extraneous causes?

A. No, except in the case of an individual that was bedridden. For instance, if there was a fire in the house, he would have a hard time getting out—more so than somebody who could walk.

Q. Would you say they are normal, healthy people? A person who is suffering from multiple sclerosis, is he a normal or healthy person?

A. Yes.

Q. What? You say he is healthy?

A. Healthy, yes.

Q. What is your experience of the average course or length of that disease?

A. Well, it runs for a period of years. I don't know how long—ten or fifteen years, or more. [116]

JENNIE M. BABBITT

resumed the stand for further cross examination and testified as follows:

Cross Examination—(Resumed)

By Mr. Jarvis:

Q. That was about 7:00 o'clock in the morning?

A. About 7:00 o'clock.

Q. And where is your room with relation to the kitchen? A. It is upstairs.

Q. Had you been in the kitchen that morning?

A. No.

Q. You had not been downstairs at all?

A. I had not left the room.

Q. Where were you in the room?

A. I was sitting beside my bed on a chair. I think I was tying my shoes, though I don't recollect exactly.

Q. You were tying your shoes?

A. Well, I—that is, to the best of my recollection.

Q. How far away from Mr. Babbitt were you?

A. Well, I should estimate six feet.

Q. And which way were you looking, Mrs. Babbitt?

A. Well, he was standing up and I don't know as I was particularly watching him, but I was conscious of what he was doing.

Q. Well, you say you don't know whether you were particularly watching him. You mean your eyes were on him or on some other object?

(Testimony of Jennie M. Babbitt.)

A. Well, I would say my eyes were on him.

Q. Well, what do you mean by "not particularly watching him?" [133]

A. Well, he always dressed alone. I had no object in watching him dress.

Q. Did you observe any particular movement before he fell?

A. Yes, I distinctly saw that twist of his feet on that loose part of the rug.

Q. You saw a twist of his feet on the corner of the rug?

A. The loose rug, and as he turned, why his feet twisted with him; the rug twisted under his feet.

Q. Were you particularly watching that?

A. Well, I saw it.

Q. Your eyes were on the floor?

A. Well, I can't say that they were. I saw this movement.

Q. Were your eyes on his face or on his feet?

A. Well, the whole movement attracted my attention, the twisting of his feet on the loose corner of the rug.

Q. You were about six feet away from him?

A. Well, approximately that. I was sitting here (illustrating) and he was facing his way.

Q. By facing this way, you mean?

A. He was facing the south.

Q. He was facing south and there was no window on the north wall?

(Testimony of Jennie M. Babbitt.)

A. Yes, there is a window on the north wall. I was near the east wall, to his left.

Q. And the chair that you were sitting in, was that near the [134] east wall?

A. Yes, near the east wall.

Q. And was Mr. Babbitt, you say, was facing south?

A. He was facing the bed—facing the south.

Q. And you were facing which way?

A. I was facing west.

Q. Was he sitting on the bed?

A. No, he was sitting on a chair.

Q. Was the chair beside the bed?

A. The chair was beside the bed, such as this might be, facing the bed.

Q. Facing the bed?

A. Facing the bed.

Q. He had gotten out of the bed and gotten into the chair?

A. He had gotten out of the chair and pulled on the long underwear over his feet and legs.

Q. Was he standing or was he sitting?

A. He sat down to pull on the long underwear. Then he stood up to pull it up and to put the arm in, and as he turned to put this left arm in, the rug slipped under his feet and he fell full length, almost at my feet.

Q. Was the chair on the rug or on the floor?

A. It was on the rug.

Q. How much of the rug did the chair occupy?

A. Well, it was what you call a scatter rug. It

(Testimony of Jennie M. Babbitt.)

didn't [135] cover the floor, and the Chair was—and the rug occupied almost the space from the bed to the window. I think it would be perhaps a three by six rug. [136]

Q. Which corner of the rug was—did you notice was un-tacked? [138]

A. Well, if this is north and this is south (illustrating), it was the southeast corner.

Q. And whereabouts on the rug was the chair?

A. Oh, it was near the middle of it.

Q. Was the entire chair on the rug or partly on the rug and partly off the rug?

A. It was entirely on the rug.

Q. It was entirely on the rug, and did the chair—the chair was an ordinary chair?

A. It was a chair with arms on it.

Q. Yes, and had four legs, or did it have a different kind of a base?

A. It was a rocking chair.

Q. A rocking chair. Was Mr. Babbitt rocking in it at the time of this accident?

Mr. Savage: Just a moment, if Your Honor please, the testimony——

The Court: I will sustain the objection to the question.

Q. Was the chair in movement? Did you observe the chair in any movement?

A. Not at all, he was standing up.

Q. Was he in front of the chair?

A. He was in front of the chair.

Q. And had he been sitting in the chair? [139]

(Testimony of Jennie M. Babbitt.)

A. He had to pull on the legs.

Mr. Jarvis: Pardon me?

A. He had been sitting in the chair to pull on the legs of this long union suit.

Q. Well, did he have ahold of anything at that time? A. No, he stood up.

Q. And his hands, you say, were pulling on the union suit?

A. Yes, he put one arm in and he turned to put the left arm in.

Q. You observed that yourself?

A. I did, myself.

Q. Did the chair interfere with your vision, at all? A. Not at all.

Q. Were his legs apart or were they together?

A. Well, he had just stood up and was perfectly steady, standing up.

Q. Did he have any shoes or slippers on?

A. No.

Q. Were his feet bare?

A. He was in his bare feet.

Q. He didn't have socks on, either? A. No.

Q. Did he have any other part of his clothes on?

A. No.

Q. Mrs. Babbitt, did he fall forward or backward? [140] A. He fell to one side.

Q. Which side did he fall towards?

A. Well, it would be the left side he went down. He was facing the south, and he fell to the side on the rug.

Q. Was he facing the chair or——

(Testimony of Jennie M. Babbitt.)

A. He was facing the bed, and the chair was behind him. He stood up and had put on his——

Q. Then he was facing north, wasn't he?

A. No, he was facing south. His back was to the north. The window was to the north.

Q. His back was toward the north and the chair was between him and the window?

A. Yes.

Q. And then was facing towards the bed?

A. Yes.

Q. There was no other rug in the room, I understand.

A. There was no what?

Q. No other rug in the room.

A. Yes, there was another scatter rug to the other side.

Q. And when he fell, he fell towards you?

A. He fell towards me, yes.

Q. Did you notice any unsteadiness in his feet at that time?

A. No, he was perfectly balanced and firm at that time?

A. No, he was perfectly balanced and firm at that time.

Q. Was he taking a step or any movement?

A. No. [141]

Mr. Savage: Pardon me. I didn't hear the answer. What was your answer to that question?

A. He didn't take any step. He just stood up.

Q. And he made no voluntary movement at all?

A. Except to turn to put his left arm into the arm of the underwear.

(Testimony of Jennie M. Babbitt.)

Q. That is, he turned his body?

A. Well, he turned, and the rug slipped under him, and he didn't get the arm in.

Q. Now what doctor did you call, Mrs. Babbitt?

A. I called Doctor Don Palmer.

Q. And what doctor responded to your call?

A. Doctor Palmer.

Q. Was it Don Palmer?

A. Doctor Don Palmer.

Q. Did he come to the house? A. No.

Q. You met him in the Seattle General Hospital? A. Yes.

Q. Shortly after Mr. Babbitt was taken to the hospital? A. Yes.

Q. Was Doctor Rex Palmer your physician also in this matter?

A. He was never my physician. He helped his father, but I never called him. [142]

Q. Did you ever see him attending to Mr. Babbitt?

A. He and his father generally came in the hospital together, often, when I was there.

Q. They both came together? A. Yes.

Q. You mentioned some kind of a medical proof of death, and you procured that and gave it to some one of the local officers of this association. Do you remember testifying to that effect?

A. Not proof of death.

Q. Not a proof of death, but proof of disability.

A. No, I never. I never made any—it was through my attorney that such an appeal was made.

(Testimony of Jennie M. Babbitt.)

Q. Didn't you sign a proof of disability of some kind? A. You mean at that time?

Q. Yes.

A. I signed an order for an autopsy.

Q. No, no, but long before then, Mrs. Babbitt. You have testified in your direct examination that you signed some proof of disability.

A. Oh, the application for accident insurance?

Q. Yes.

A. Yes, while Mr. Babbitt was in the hospital, when I called up Mr. Matthews and told him that Mr. Babbitt had had a very serious accident, and he sent me the [143] blanks to fill out, applying for accident benefits, and Mr. Babbitt signed it, and then I took it to Doctor Palmer for the medical description required on the application.

Q. Which doctor did you take it to?

A. Doctor Don Palmer.

Q. And then what did you do with it?

A. That is the last I ever saw of it. I don't know what became of it.

Q. Did you give it to Mr. Matthews or to any of the other officers of the association?

A. Doctor Palmer's secretary took care of it. I didn't do anything more about it.

Q. You just took it in to Doctor Palmer, and that is all? A. Yes.

Q. That is the last you saw of it?

A. That is the last I saw of it.

Q. How often did Doctor Rex Palmer come to the hospital?

(Testimony of Jennie M. Babbitt.)

Mr. Savage: That is a question that is difficult to answer.

Q. Just approximately? Would you say he came every day that Doctor Don Palmer came?

A. Yes, he and Doctor Don Palmer saw him every day.

Q. And they operated on Mr. Babbitt?

A. Well, they—what they told me that his son assisted him. [144]

Q. Well, did you see the son during or about the time of the operations?

A. Well, when he was brought down from it I saw him that day, after the operation.

Q. And did you discuss Mr. Babbitt's condition with him?

A. Well, they didn't always come together, whichever one was there, and I could get ahold of, I would talk to him.

Q. Did Doctor Rex Palmer ever come there by himself? A. He may have, I don't know.

Q. Did you ever talk to him alone about this matter?

A. Yes. He explained to me the meaning of a fat embolus. He said it was like the sap of a tree, and that it flow in the blood stream until it hit a vital part—

Mr. Savage: A little louder, I didn't hear the last part of that answer.

A. Doctor Rex Palmer explained to me the meaning of a fat embolus, and he said that it was

(Testimony of Jennie M. Babbitt.)

like the sap of a tree; that it would be flowing in the blood stream until it hit a vital part.

Q. And when did that conversation take place?

A. Well, it was before Saturday morning, when it hit him.

Q. You say it was before the Saturday morning when he became unconscious?

A. Well, no, it couldn't have been, because we did not know [145] this had occurred until after that Saturday morning.

Q. As a matter of fact, weren't you just about to take Mr. Babbitt home on that Saturday morning?

A. Yes, he was doing so well that I had made all arrangements to take him home.

Q. And who had advised you that you could take him home?

Mr. Savage: Just a moment, that is assuming that somebody did.

Q. Did anybody advise you that you could take him home? A. Yes, sir.

Q. Who advised you?

A. Doctor Don Palmer.

Q. Did Doctor Rex Palmer have anything to do with that?

A. I don't know, Don Palmer was my physician at all times.

Q. Were you making preparations to take Mr. Babbitt home?

A. Yes, I had secured a hospital bed, and had

(Testimony of Jennie M. Babbitt.)

secured the visiting nurse service, and we were going to take him home Saturday morning.

Q. And that was on the advice of Doctor Don Palmer, you say? A. Yes.

Q. Now, did you have any other conversations with Doctor Rex Palmer?

A. Well, I may have. I don't recall any particular conversations. [146]

Q. Now, was he able to stand readily without any support when he was not walking? Did he have to have anything to support him?

A. Yes, he could stand without walking, there is no question about that.

Q. Did he have any difficulty with his vision or his eyesight? A. He never wore glasses.

Q. He never wore glasses. Did he read books or magazines without the use of glasses?

A. He, he read all the time. It was his chief pleasure.

Q. You say he got out of bed alone?

A. Yes, sir.

Q. You did not assist him in any way?

A. No.

Q. And after he got out of bed he sat in the rocking chair? A. Yes.

Q. After he had put on a part of his union suit while seated in the rocking chair, he stood up?

A. Yes, sir.

Q. And he was standing?

A. He was standing.

Q. At the time he fell? A. Yes. [152]

(Testimony of Jennie M. Babbitt.)

Q. After he retired from the Railway Mail Service—that is, from active duty as a Postal clerk—railway mail clerk, was there any change or lowering in the amount of dues and assessments which he paid to the Railway Mail Association?

A. None whatever. [154]

Q. Directing your attention to what has been marked Plaintiff's Exhibit 5 for identification, Mrs. Babbitt, can you tell us what that is?

A. This is a picture of my husband, taken approximately ten years ago.

Mr. Jarvis: Your Honor, I don't know as this picture is relevant. I object to it on that ground.

The Court: It is relevant unless it is taken too remote in time. She says it was taken——

Q. Was it taken after he retired from the Railway Mail Service?

A. Yes, about four years afterwards.

Mr. Savage: I offer it then. I think it is material with respect to his condition.

Mr. Jarvis: It is 1932, Your Honor.

Mr. Savage: After counsel contended he had been diagnosed suffering from a defect which, under the terms of their answer, contributed to his death, and I think that his appearance as indicated by this picture is material.

The Court: The objection will be overruled. It may be admitted in evidence.

Mr. Jarvis: Exception, Your Honor. [156]

GUERNSEY K. CHAPLIN,

produced as an adverse witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Savage: [184]

Q. Did you see a small scatter rug alongside of the—of one of the beds there? [189]

A. Yes, sir.

Q. Did you see the rocking chair there, either on or beside the scatter rug? A. Yes, sir.

Q. Now, was it any part of your duty as a president of the local branch of the Railway Mail Association to make a report of your investigation?

A. Yes, sir.

Q. Did you make such a report? A. Yes.

Q. And to whom was that report sent?

A. Mr. John J. Kennedy, the national secretary, at Portsmouth, New Hampshire.

Q. Did you keep a copy of that report?

A. I think I did, yes, sir.

Q. Well, now, you say you think you did. Don't you know?

A. Well, I did. I have to assume that I did because I keep copies of everything.

Q. Now, without assuming, did you keep a copy of the report? A. Yes, sir.

Q. Do you have a copy of that report with you?

A. No, sir.

Q. Where is that copy?

(Testimony of Guernsey K. Chaplin.)

A. I think it is in the files. [190]

Q. You do? A. Yes, sir.

Q. Is that the report which you made to Mr. Kennedy after your investigation into the circumstances of this accident? A. Yes.

Mr. Savage: Offer it in evidence, Your Honor.

Q. That is your signature appended to it, is it?

A. Yes, sir.

Q. Is that an original or a copy, do you know?

A. It is a copy.

Q. A copy? A. No, this is the original.

Q. Are you sure, now, Mr. Chaplin? I don't suppose it makes much difference.

A. My copies are on yellow paper.

Q. Your copies are on yellow paper?

Mr. Jarvis: I have no objection.

The Court: It will be admitted in evidence.

(Whereupon letter dated July 22, 1943, to Mr. Kennedy from G. K. Chaplin referred to, was received in evidence and marked Plaintiff's Exhibit No. 7.)

Mr. Savage: Ask permission to read it to the jury at the present time.

The Court: Yes. [195]

A. I also furnished her with a form of an affidavit, as to her identity.

Q. Her relationship to Fred I. Babbitt?

A. Yes, sir.

Q. And did you take her to some notary—before some notary to have it notarized? A. Yes, sir.

(Testimony of Guernsey K. Chaplin.)

Q. And was that forwarded to the defendant associations home offices? A. Yes, sir.

Q. And now, did you send to them any other documents, referring specifically to a certified copy of the death certificate? A. Yes, I did.

Q. You recall of it, you did? A. Yes, sir.

Q. Do you recall any other documents or records which you sent to Mr. Kennedy, the secretary of the National Organization, in connection with this case?

A. It is my belief that I sent him a card or statement.

Q. A coroner's statement, answer that is a——

A. Furnished me by the undertaker. That is the way I recall it.

Q. That is your recollection, now, that you furnished him [204] with a certified copy by the coroner's statement, is that right? A. Yes.

Q. Anything else that you can recall?

A. Well,——

Q. I will put the question this way, did you assist Mrs. Babbitt in the preparations of her claim for death benefits under this certificate which was presented to the committee on claims? A. No.

Q. Do you know whether such a claim was presented to the committee on claims?

A. Yes, sir.

Q. That is the regular and usual course of procedure, under your constitution and by-laws?

A. Yes, sir.

Q. And was that rejected? A. Yes.

(Testimony of Guernsey K. Chaplin.)

Q. Denied, and do you know whether after that, within the time limits prescribed, she appealed to the executive committee?

A. She appealed to the executive committee.

Q. You know that? A. Yes.

Q. And was her appeal allowed or was her claim still denied [205] or rejected?

A. It was rejected.

Q. And do you know that she received a notification to that effect from Mr. Kennedy, of the home office? A. I have a copy.

Q. You have a copy?

A. I have seen a copy of the notification, yes.

Q. Do you know whether there was any reduction in the amount of dues or assessments paid by Mr. Babbitt to the Railway Mail Association after he retired from active duty?

A. I don't know about the record in Mr. Babbitt's case. I have no access to them, as to his payments into the Association.

Q. Well, I'll ask you if it is not a fact that the payments made by Mr. Babbitt, or on his behalf, were the same after his retirement from active service as they were before?

A. I would have to have the records to know that. I can't state it.

Q. Well, you are familiar with the constitution and by-laws, are you not?

A. Yes, but I don't know what option he took.

Q. Well, is there any provision in the constitu-

(Testimony of Guernsey K. Chaplin.)

tion and by-laws for the reduction of dues and assessments in a [206] case of that kind?

A. Not for full membership.

Q. Well, he was a full member, was he not?

A. Yes, I think he was. [207]

DR. DON H. PALMER,

recalled as a witness on behalf of the Plaintiff, was examined and testified further as follows:

Cross-Examination—(Resumed)

By Mr. Jarvis:

Q. Doctor Palmer, can you hear me now?

A. Can I what?

Q. Can you hear me now?

A. I can when you talk that way.

Q. Doctor, your office is in the Medical Arts Building in Seattle, is that right?

A. Yes, sir.

Q. And Doctor, Rex Palmer's office, was that there also? A. Yes, sir.

Q. Are you and Doctor Rex Palmer associated in the—were you associated in the practice of medicine? A. Yes, sir.

Q. Were both of you associated on this case?

A. Yes, sir.

Q. And I believe you testified you agreed with Doctor Rex Palmer's diagnosis of the case?

A. A fractured hip, yes, sir.

Q. And the treatment the patient was given?

A. Yes. [212]

(Testimony of Dr. Don H. Palmer.)

A. (Continuing): He says, "This is the body of a fairly well developed and well nourished white male." Now, Mr. Babbitt never was a well man at any time. He was a moderately developed man as far as his size is concerned. Now that is an individual opinion that he has given.

Now he makes an anatomical diagnosis. I don't know how long after death this was made. I don't know whether this body had been embalmed before the examination was made. I knew nothing about the autopsy until after this trial started. Now he says in his anatomical diagnosis in his findings: One, fracture of the left femur. Two, hemorrhage like infarct in both lungs, extensive infarction of the pons, overlying the ventricles with area of necrosis and slight hemorrhage, generally marked arterial sclerosis, marked edema of the brain, marked arterio chronic nephritis.

Now, we will take those up one at a time. The fracture of the left femur means the fracture of the left hip bone?

A. That means the left femur—that is the thigh bones.

Q. Marked infarction of both lungs. What does that mean?

A. That means just exactly that, an infarction of the lungs. I described it to you yesterday as being like a shingle bolt in a river. If you would imagine that river running in a reverse direction to a normal river. The bolt was in [218] the mouth of the river. It goes upstream until the stream di-

(Testimony of Dr. Don H. Palmer.)

vides. The bolt goes into one of the two main trunks—perhaps goes over to the left side, goes through that until it subdivides, again goes into one side or the other. It finally goes up to the tributaries where it can't go through either branch, and it blocks both of them.

Q. Well, now——

A. (Continuing): Now everything beyond that point where the blood vessel is blocked, is dead, so to speak. It does not get its normal nourishment.

Q. And that is called a necrosis area?

A. What is that?

Q. That is called a necrosis area? A. Yes.

Q. Now, the autopsy does not show, does it, Doctor, that there was an embolus in either of the lungs or the brain?

A. It said there was marked infarction.

Q. That is not an embolus, is it?

A. No, but it is caused by an embolus.

Q. Is it necessarily caused by an embolus?

A. Yes, sir. That is what I tried to explain to you yesterday.

Q. Could it be caused by a breaking of a blood vessel?

A. No, it is caused by a blocking of a blood vessel. [219]

Q. Do blood vessels ever break without being blocked? A. Oh yes.

Q. As a matter of fact, in the more or less advanced stages of arterial sclerosis, are blood vessels more or less prone to break?

(Testimony of Dr. Don H. Palmer.)

A. Yes. That sclerosis means hardening. Things that are hard break.

Q. In ordinary language, what is the meaning of arteriosclerosis?

A. Hardening of the arteries.

Q. What is the meaning of arteriosclerosis?

A. The hardening of the arteries. The same thing.

Q. Now you notice that autopsy report shows there was an extensive—what?

A. Infarction.

Q. Infarction of both lungs. It does not say that there was any embolus found in either one of the lungs, does it?

A. No, but anybody that understands pathology know that was preceded by an embolus.

Q. Could it necessarily have been preceded by an embolus? A. Absolutely was.

Q. I am not asking you what it was. I am asking you what the possibilities and probabilities are.

A. I say as a fact it was. [220]

Redirect Examination

By Mr. Savage:

Q. Doctor Palmer, after reading the autopsy report of Fred I. Babbitt, signed by Doctor Alfred L. Balle, which is defendant's Exhibit A-1, have you changed your opinion as to the cause of death of Fred I. Babbitt? A. Not one particle.

Q. Is it still your opinion that his death was due to a fat embolus, caused by a fractured femur?

A. Combination of a fracture of his femur, yes.

(Testimony of Dr. Don H. Palmer.)

Q. Could the fracture of the femur be caused by an accidental fall, in your opinion?

A. It is a very common cause of a fracture of the head and neck of the femur. [236]

Q. Is that especially true in persons of the age of Fred I. Babbitt? A. Yes, sir.

Q. Doctor, was the arterio-sclerotic condition which is indicated by this report—by the autopsy report which is your exhibit A-1, natural or normal for a man of the age of 70 years?

A. I would say it is normal.

Q. Referring again to the defendant's exhibit A-1, at the bottom of the page to this language, Doctor, "Anatomic Diagnosis, Fracture of left femur; 2, Hemorrhagic infarct of both lungs", in your opinion was that hemorrhagic infarct to both lungs due to a fat embolus?

A. Yes, from a fractured femur.

Q. Reading further, "Extensive infarction of the pons overlying the ventricles with areas of necrosis and slight hemorrhage". In your opinion was the extensive infarction of the pons due to an embolus which came from a fractured femur?

A. The embolus came secondarily from the lung. It came from the femur to the lung first, and then after that area in the lung becomes degenerated and soft, then it gets into the blood stream from the lung and goes to the brain, and that was the final cause of his death.

Mr. Savage: That is all, Your Honor. [237]

DR. CONRAD JACOBSON,

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Savage:

Q. Doctor, will you give us your full name?

A. Well, my name is Doctor Conrad Jacobson.

Q. Where do you live?

A. In the city of Seattle.

Q. And are you licensed to practice medicine in the state of Washington? A. I am.

Q. And for how long have you been so licensed?

A. I have been here since 1921 and '22, I think. I practiced nothing else but surgery, and most of my work being neurological surgery.

Q. When you say most of your work is neurological surgery, what kind of surgery—

A. That means surgery of the brain, spinal cord and nerves.

Q. Where did you receive your training Doctor?

A. Well, I graduated from Hopkins—in 1911—John Hopkins. I stayed there a year, and had charge of surgical research for a year. From there I went up to Boston and lived in the Brigham Hospital. That is the teaching college, and [241] taught surgery there for almost ten years. From there I went to teach at the University of Minnesota full time, and have been in private practice and surgery, and general neurological surgery in Seattle since about 1922 or 1921, I have forgotten.

(Testimony of Dr. Conrad Jacobson.)

Q. Doctor, during the course of your training and experience, were you ever associated with Doctor Harvey Cushing?

A. I was with him for ten years.

Q. And who was Doctor Harvey Cushing?

A. Well, Doctor Harvey Cushing was one of the pioneers in brain surgery.

Q. And you were with him for a period of ten years?

A. Pretty close to ten years, but I devoted myself to both general and neurological surgery.

Q. Are you a member of any of the boards of any of the Seattle hospitals?

A. Yes, sir, I am on the staff of the Seattle General Hospital, and on the staff of the Orthopedic Hospital. I am consultant at the Marine Hospital—consultant in surgery, and also on the staff of the King County Hospital.

Q. Are you a member of the King County Medical Society? A. I am, yes.

Q. Have you ever been an officer of that organization? A. Not of the King County.

Q. Have you been an officer of a medical society? [242]

A. Yes, president of the Seattle Surgical Society.

Q. Doctor, did you ever know Fred I. Babbitt?

A. I never saw him. I am only familiar with his history, and my conversation with Doctor Palmer.

(Testimony of Dr. Conrad Jacobson.)

Q. Have you examined the hospital records in the Seattle General Hospital?

A. I have examined the hospital records, yes.

Q. And during the time you were in the court room, I will ask you, Doctor, if you did not read and examine the Defendant's Exhibit A-1, which is an autopsy report of Fred I. Babbitt by Alfred L. Balle, pathologist?

A. I saw part of it, and I heard some of it discussed here in the court room.

Q. Doctor, reading to you from the anatomic diagnosis of Defendant's Exhibit A-1, item 1, fracture of left femur; 2, hemorrhagic infarct of both lungs, extensive infarction of the pons overlying the ventricles with area of necrosis and slight hemorrhage.

Tell, us, Doctor, whether you as an expert are able to form an opinion as to the cause of Fred I. Babbitt's death?

Mr. Jarvis: Your Honor, I object to that question as incompetent, irrelevant and immaterial, and as not covering the issues or the facts as developed in this case, and because it is based, or attempted to be [243] based on some record that is not produced nor in evidence in this case.

The Court: I understand the question is based not only on the reading there, but upon the doctor's examination of the hospital records, indicating when the patient came in——

Mr. Savage: Yes, and the reading of the Defendant's own exhibit, Your Honor.

(Testimony of Dr. Conrad Jacobson.)

The Court: Independent of any previous history perhaps, would not be a sufficient hypothesis to base an opinion, but if he is familiar——

Q. Basing your opinion upon the hospital records you have examined and the reading I have made just now——

Mr. Jarvis: May I have a further objection that the hospital records are not in this case at all.

Mr. Savage: They have not been admitted, but the doctor testifies that he did read them at the Seattle General Hospital.

Mr. Jarvis: That, Your Honor, is injecting an element into this case that is entirely outside of it right now.

The Court: I think perhaps you better frame your question a little broader, taking the history of this case from the date of the accident and as you contend the nature of the accident. [244]

Mr. Savage: First of all, Your Honor, please, I offer in evidence Plaintiff's Exhibit 4 for identification, which are the x-rays and hospital records of the Seattle General Hospital relating to the case of Fred I. Babbitt from July 9 up to and including the day of his death.

The Court: Any objection?

Mr. Jarvis: They have not been sufficiently identified in this case and for that reason I do not object to them.

The Court: The x-rays have been sufficiently identified. I do not think the hospital records were.

Mr. Savage: I think the hospital records were

(Testimony of Dr. Conrad Jacobson.)

identified as a part of the permanent records of the Seattle General Hospital by Mr. Fels, who is the custodian thereof, and kept in their usual and regular course of business, Your Honor.

The Court: I think that is correct, Mr. Jarvis. Objection will be overruled and exception allowed, and it will be admitted in evidence.

(Whereupon hospital records and X-rays referred to were received in evidence and marked Plaintiff's Exhibit No. 4).

Q. Now Doctor, taking into consideration the examination which you made of the hospital records at the Seattle [245] General Hospital of Fred I. Babbitt, of his disability from July 9 to July 30, inclusive, the day that he died, and also taking into consideration this language from Defendant's Exhibit A-1:

"Anatomic diagnosis: Fracture of left femur; hemorrhagic infarct of both lungs; extensive infarction of the pons overlying the ventricles with areas of necrosis and slight hemorrhage". Tell us, Doctor, whether you are able to form an opinion as to the cause of Fred I. Babbitt's death.

Mr. Jarvis: Just a minute, Your Honor, I object to that question.

The Court: Well, he may answer the question first "yes" or "no".

A. Yes, sir, I think I can.

Mr. Savage: Just answer "yes" or "no."

Q. What is your opinion, Doctor? Just a moment, don't answer.

(Testimony of Dr. Conrad Jacobson.)

Mr. Jarvis: Now may I make the objection that the question does not cover the evidence nor the record in this case, nor does it cover the elements that have been introduced in evidence relating to either the disease or the death of Mr. Babbitt?

The Court: Well of course I do not know what there is in the hospital records, if they show anything about the disease. It is admitted by all parties—it is [246] not in dispute he was afflicted for a period of years.

Mr. Savage: I will add the further element for the Doctor's consideration, assuming also that Fred I. Babbitt was afflicted with multiple sclerosis at the time and had been since 1926 or 1927, Doctor Jacobson?

Mr. Jarvis: I make the same objection, Your Honor.

The Court: Objection will be overruled, exception allowed.

Q. Doctor, in your opinion what was the cause of Fred I. Babbitt's death? A. He died——

Mr. Jarvis: Could my objection go to all this?

The Court: Oh it does, certainly.

Mr. Jarvis: Without repeating it.

A. (Continuing) In my opinion he died from an infarction of the lungs and infarction of the pons, as a complication to a fractured femur, directly due to the fractured femur.

Q. Well, Doctor, in your opinion as a medical expert, can or may a fractured femur result from a fall?

(Testimony of Dr. Conrad Jacobson.)

A. A fractured femur may result from a fall. That is the common cause of a fractured femur.

Q. Doctor, in your opinion, would Fred I. Babbitt, considering now his history and the case records, die from the fractured femur and infarction, even if he had not been [217] afflicted with multiple sclerosis? Now don't answer until counsel has an opportunity to object.

Mr. Jarvis: Your Honor, this witness did not see Mr. Babbitt during his lifetime at all. The question is a hypothetical question. It is not based on the evidence in this case, and does not purport to contain all the elements that are before the Court and the jury in this case.

The Court: I think I shall sustain the objection to its form.

Q. Doctor, assume an individual of the age of 70 years; assume also that that individual is afflicted with multiple sclerosis and has been for fourteen or fifteen years. Assume further that that individual suffered a fall from which he sustained a fractured femur. Assume further, Doctor, that the fracture was reduced, the leg placed in a well splint, and for a period of time the man seemed to make satisfactory progress; assume that a week later he lapsed into a coma from which he never regained consciousness, and that he did approximately ten days later. Are you able to form an opinion, Doctor, as to whether the multiple sclerosis with which he had been afflicted, was a contributing cause of death?

(Testimony of Dr. Conrad Jacobson.)

Mr. Jarvis: Your Honor——

The Court: Answer “yes” or “No”. [248]

A. Yes, sir, I think I can.

Mr. Jarvis: Just a minute, Doctor. I make the same objection that the question does not cover, nor does it purport to cover all of the evidence, or the record in this case. I refer especially to Doctor Palmer’s testimony in cross examination.

Mr. Savage: I believe, Your Honor, the question fairly covers all the elements of the case, insofar as they have been introduced by the plaintiff, and also by the plaintiff’s witnesses.

The Court: Perhaps that question should be broad enough to include all the elements set forth, whether they are accepted or not, in this autopsy report.

Mr. Savage: I am willing to do that.

Q. (Continuing): Assume also, that the autopsy report showed the following facts, that the body was one of a fairly well developed and well nourished white male. Skin generally is clear and free from eruption. The chest is symmetrical, the abdomen is on level with the chest. There is a slight discoloration over the left foot and the left leg and foot is everted.

When the body is opened the peritoneum is smooth and glistening and the intestines are of uniform caliber. The liver is at the usual position and the stomach is not distended. The spleen lies free. The [219] kidneys are small and when examined the capsules strip with difficulty leaving a markedly

(Testimony of Dr. Conrad Jacobson.)

scarred contracted surface beneath. There is a marked diminution of the cortex of the kidney. When the chest is opened the lungs fail to meet in the midline. Both lungs lie free and the lower lobe of the left lung shows some areas of consolidation. The lower lobe of the right lung show a large hemorrhagic infarct. When the heart is opened it is found filled with fluid and clotted blood. There are no valvular changes. The coronary arteries are patent throughout. There as a marked sclerosis of the arch of the aorta with atheromatous plaques. The cut surface of the spleen show an intact capsule with an increase of the fibrous tissue.

When the calvarium is removed the dura stands high above the brain, due to fluid beneath. The pia-arachnoids show diffuse scarring with considerable fluid beneath. There is a diffuse whitish gray thickening of most of pia-arachnoid. When the brain is opened the ventricles are patent. The left ventricle appears slightly dilated in relation to the right. Sections of the cortex and the basal nuclei of the brain shows no abnormal changes. Sections of the brain stem and pons overlying the ventricles show an area of necrosis with a hemorrhagic coloring. This necrosis and coloring extends [250] for a distance of 1.5 cm and ends about at the medulla, this is most marked on the left half though it has crossed the midline in some areas of the pons. The arteries of the basal vessels are markedly thickened and show many areas of sclerosis. The cerebellum show no noteworthy changes. The base of the skull

(Testimony of Dr. Conrad Jacobson.)

is intact. There is no evidence of fracture in any portion of the skull. There is no evidence of gross hemorrhage.

Anatomic diagnosis: 1. Fracture of the left femur. 2. Hemorrhagic infarct of both lungs. Extensive infarction of the pans overlying the ventricles with areas of necrosis and slight hemorrhage. 3. Generalised marked arterial sclerosis. 4. Marked edema of the brain. 5. Marked arterio sclerotic nephritis.

Detor, assuming what I have read to you in addition to the history which I gave you, and the records of the Seattle General Hospital which have been admitted here in evidence, are you able to form an opinion as to whether Fred I. Babbitt would have died from a fracture of the left femur, even if he had not been afflicted with multiple sclerosis?

Mr. Jarvis: Your Honor, I make—oh, he can answer yes or no.

A. Yes, I think I can.

Q. And Doctor, what is that opinion? [251]

Mr. Jarvis: Your Honor, I make the same objection, that the question does not cover the records in this case as established, nor the evidence that is in, and I make the objection to the form of the question.

The Court: I think the question should perhaps be framed slightly different—not limited to multiple sclerosis, but multiple sclerosis and the other conditions that have been disclosed by the report that you just read, and the hospital records and I assume that was your intent to ask the question.

(Testimony of Dr. Conrad Jacobson.)

Mr. Savage: It was. May I modify it in the language that Your Honor has used?

Q. Now Doctor, are you able to form an opinion as to whether he would have died from the complications of a left—or a fracture of the left femur, even though he had not—even though he had not afflicted with multiple sclerosis, or complications which might arise, dependent thereon?

A. Yes, sir, I think I can.

Q. Now, Doctor, what is your opinion in that respect?

Mr. Larvis: I make the same objection.

The Court: Same ruling, and an exception allowed.

A. I think Mr. *Babbitt* from the direct complication of his injury, I believe that his multiple sclerosis had nothing [252] at all to do with his death.

Mr. Savage: Cross examine. [253]

Cross Examination

Q. Does it affect the entire body?

A. No, it depends on where it hits.

Q. Does it affect the entire nervous system?

A. No, that is why it is called multiple. It hits in different spots.

Q. Is it called multiple because of the large number of regions?

A. That is the reason.

Q. Where is the place where it hits most?

A. Mostly the spinal cord.

(Testimony of Dr. Conrad Jacobson.)

Q. And what part of the spinal cord?

A. Any part of the spinal cord.

Q. Does it affect the nerves of the spinal cord?

A. Well yes, of course it affects the nerves which come from the spinal cord.

Q. Is a person with multiple sclerosis a healthy person?

A. They may be just as healthy as you or I.

Q. Do you know of any cases——

A. They don't recover, but they don't die, in multiple sclerosis.

Q. How long could they live?

A. Anywhere from fifteen to twenty years, and live a normal life. [255]

Q. When multiple sclerosis does hit the pons, what is the result?

A. That part which is hit degenerates, and becomes scar tissue.

Q. And as that forms scar tissue, does it have any complicating effect?

A. Well sure, it involves the nerves which come from that part. If it hits the part, for instance, that the arm comes from, the arm is likely to become stiff and paralyzed.

Q. If it hits the nerves that the legs come from, what happens?

A. The leg may get stiff and they may not have good coordination of that leg.

Q. That is quite common in multiple sclerosis cases?

(Testimony of Dr. Conrad Jacobson.)

A. Quite common, but that is generally a slow process. That may take fifteen years.

Q. You say it may take fifteen years. If a man was retired for a permanent disability in 1928, would you say that the disease had reached what state——

Mr. Savage: Just a moment, Doctor.

A. I can't tell you.

Q. I will say in this case we are talking about, the subject you have never seen, but Mr. Fred I. Babbitt—and he was a railway mail clerk, as you probably have heard. A. Yes. [257]

Q. Well, this was in 1928, Doctor, and he died in 1943. He was permanently retired for permanent total disability in 1928, and he was unable to follow any gainful occupation from that time on.

Mr. Savage: Just a moment.

Q. (Continuing): The diagnosis at that time, according to the record in this case, was multiple sclerosis. His legs were affected.

A. That does not mean anything. You tell me how much the legs were affected. A man can have multiple sclerosis and not be able to talk, and do everything else all right.

Q. He walked with such difficulty that he was unable to perform his occupation or duties as a railway mail clerk.

A. Yes, if they tell me he couldn't walk, or wasn't able to, I would say he most probably was in an advanced stage of multiple sclerosis.

Q. Now as the multiple sclerosis advanced from

(Testimony of Dr. Conrad Jacobson.)

then until 1943—is it a progressive or regressive disease?

A. They get better, and they get worse. They get better and then worse, but the general trend is downward.

Q. And each time they get better, isn't the next setback worse than the previous condition?

A. That is what I say, the general trend is downward. [259]

Mr. Savage: Just a moment, Your Honor please. That is not cross examination, if he is going to put a [260] hypothetical question.

The Court: He can qualify the question by the history.

Mr. Jarvis: I do not intend to ask a hypothetical question.

Q. You gave an answer to a hypothetical question in this case. Now what I want to know is: Is it humanly possible, or is it possible, for Mr. Babbitt's death to have been caused by any other—for any other reasons than those that you stated?

A. Not as far as the history that I read of him, and so on. Here is a man who has a fractured femur. He dies. In my opinion he dies. He has an infarct of the lung. He has an infarct of the brain stem. That is caused by the fracture. He would have had that whether he had multiple sclerosis or not. A lot of people—anybody who has a fracture is likely to have that. The bigger the fracture the more chances there *are have*—

(Testimony of Dr. Conrad Jacobson.)

Q. Could he have had it if he had not had the fall?
A. Not from his multiple sclerosis.

Q. Could he have had it from arterial sclerosis?

A. I don't think so. It is all supposition.

Q. You get down to the supposition. That is what I want to get at. What supposition?

A. I am not making any supposition. I say, here is a man [261] who had a fractured femur. Following the fractured femur, as occurs quite commonly, he had an infarct of both lungs, and he had an infarct of the brain stem. These all show that they were recent. The autopsy shows they were recent. Therefore in my opinion, that man died from a complication following a fractured femur. They die the same—same complications, with or without a multiple sclerosis.

Q. Doctor, that is just your opinion?

A. I am giving you my opinion.

Q. But what I want to know is, could anything else have caused the death?

A. Perhaps you can tell me. I don't know.

Q. Well, Doctor, you are a doctor.

A. Well I say, perhaps somebody shot him, but I didn't see him.

Q. But could he have broken an artery?

A. A broken artery wouldn't give him that. There is no sign of a broken artery.

Q. Well, what is the hemorrhage from?

A. The hemorrhage of this case came from an infarct.

Q. What is an infarct?

(Testimony of Dr. Conrad Jacobson.)

A. An infarct is a clogged up artery. A blood clot gets in and plugs up the artery. Therefore the blood can't get out of that area, and you have a hemorrhagic area. The blood [262] can't come in. Therefore it dies, if you want to put it that way.

Q. Does the artery break?

A. No, the artery does not break. The artery is plugged up, just the same as a hose is plugged up, and won't allow the water to go through that hose.

Q. Well, now——

A. A hemorrhage and an embolus is two different things, entirely.

Q. What is a hemorrhagic infarct?

A. That is what I am trying to tell you, that is a hemorrhagic infarct. It is caused by a blood clot. The blood can't get out, can't you see? In the tissues we have arterial blood which comes in and the poor blood goes out. When you get an infarct, if the blood can't go out—if it can't come in, because it is the force of the blood that forces it out. Therefore that area which is not supplied with blood dies, and we call it an infarct, and infarcts are particularly dangerous in the brain because they have only one supply.

Q. Doctor, would the infarct in the pons cause death?

A. It may cause death. That depends entirely on the size of it.

Q. You say it may cause death?

A. Well sure, it may cause death. [263]

Q. What I want to know, is it possible for this

(Testimony of Dr. Conrad Jacobson.)

foreign matter to get into the blood stream from any other source than the broken hip?

A. In my opinion, no. If he had a stroke in the brain, or a hemorrhage any place else, it might possibly could have gotten in. Such a thing is possible, but that is all conjectural. I might shoot the man and get a blood clot from that, but here is a man who had a fractured femur, a large amount of blood in the tissues, fat coming from the bone marrow. You find the results of it in the lung, and you find the result of it in the brain.

Q. But what I am asking you is, do people die of hemorrhagic infarction when they haven't a broken bone, or a broken tissue?

A. No. I mean a blood clot has to come from something, and it usually comes when blood is spilt. The blood does not clot in your veins at all. We would all be dying if that is true. I can hit a person and bleed, or something like that, and then it might clot and then be carried away?

Q. Could it be formed by a lesion?

A. A lesion?

Q. Yes. [266]

A. Well, a lesion means some injury. A lesion means a disease. A blood clot is a lesion. Scarlet fever is a lesion. I can't answer that. [267]

Mr. Savage: We rest, Your Honor.

The Court: The jury now will be excused until 10:00 o'clock tomorrow morning, and you will report back here at that time.

(Whereupon the jurors retired from the court room.)

The Court: Now, Mr. Jarvis, I assume that you desire to make a motion.

Mr. Jarvis: Yes, Your Honor.

The Court: I would rather you do that now.

Mr. Jarvis: Your Honor, I would like to make a few motions, that according to the rules, that Your Honor make a direction to the jury to bring in a directed verdict, and that Your Honor decide the case at this time in favor of the defendant, because of the insufficiency of the plaintiff's evidence, and because the facts as established, have left both the cause of the accident, and also the cause of the death in such a state that the verdict of the jury can only be based on speculation and conjecture, and not on surmises which may be drawn from facts.

(Whereupon argument by counsel.) [290]

DR. ALFRED L. BALLE,

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows: [294]

Cross Examination

Q. Now you say you found a hemorrhagic infarct of both lungs? A. Yes, sir.

Q. And was that hemorrhagic infarct of both lungs extensive enough to cause death, Doctor?

A. Well, that varies.

(Testimony of Dr. Alfred L. Balle.)

Q. I am talking about this particular case, Doctor. A. I really don't know.

Q. You don't know? A. No.

Q. Well can you give us your best opinion as an expert? A. Yes, I can.

Q. What was that opinion?

A. My opinion is that the infarction was found in both lower lobes, and——

Q. Doctor, pardon, that was not the question I asked you. A. I will explain it to you.

Q. Go right ahead.

A. And that would leave considerable lung tissue not affected, and there would be a chance that the person could live with that condition.

Q. All right, now you still haven't answered my question. [325]

A. That is my opinion. I don't know whether it is.

Mr. Jarvis: He answered it.

Mr. Savage: We will let the Court pass on it rather than counsel for the defendant.

Q. Doctor, in your opinion. when you say hemorrhagic infarct of both lungs, in your opinion was that hemorrhagic infarct to both lungs extensive enough to cause death? A. In this case?

Q. Yes. A. No.

Q. Could it have caused death in this case?

A. Yes.

Q. It could have caused death? A. Yes.

Q. Now, Doctor, what is an infarct?

(Testimony of Dr. Alfred L. Balle.)

A. That is an area of tissue deprived of its blood supply.

Q. The infarct itself is the area of tissue deprived of the blood supply? A. That is right.

Q. And what causes an infarct?

A. An obstruction of the blood supply.

Q. Can an embolus cause an infarct or an obstruction of the blood supply? A. Yes.

Q. Assuming, Doctor, that there was an embolus in the blood [326] stream in this case, and that it came and lodged in the lungs, could it have caused this infarct? A. Yes, sir.

Q. Now you also say, Doctor, that there was an extensive infarction of the pons overlying the ventricles, with areas of necrosis and light hemorrhage.

A. Yes, sir.

Q. Was that extensive infarction of the pons sufficient to cause death? A. Yes, sir.

Q. And could that extensive infarction of the pons have been caused by an embolus?

A. Yes, sir.

Q. Now you say "slight hemorrhage." Doctor, is it or is it not a fact that the hemorrhage was slight because the blood supply was cut off by the embolus or thrombus?

A. Well, that could have been due to a small rupture of a vessel, that amount of hemorrhage.

Q. I see. Well, if there was no obstruction the hemorrhage would have been more extensive, isn't that right, Doctor?

(Testimony of Dr. Alfred L. Balle.)

A. Not necessarily. Ordinarily in that type of infarct there is no hemorrhage connected with it.

Q. Is there a discoloration? A. Yes.

Q. And what color is the discoloration? [327]

A. It becomes gray and mattery like. [328]

Q. Now, Doctor, did you in response to a question put by Mr. Jarvis say that the hemorrhagic infarct to both lungs was a physical defect?

A. Yes, sir.

Q. Doctor, but is that physical defect not caused by an obstruction? [330] A. Yes, sir.

Q. So what makes that defect is an obstruction, an embolus or a thrombus? A. Yes, sir.

Q. And Doctor, you also stated, I think, in response to a question put by Mr. Jarvis that the extensive infarction of the pons overlying the ventricles was a physical defect? A. Yes, sir.

Q. Now that physical defect has to be caused by something, does it not, Doctor?

A. That is right.

Q. And that physical defect was caused by an obstruction, was it not, Doctor?

A. Of his blood supply.

Q. Of the blood supply, and Doctor, in your opinion was that obstruction of the blood supply which resulted, and the physical defect, caused by an embolus or a thrombus?

A. I have no way of telling.

Q. Well it could have been caused by either a thrombus or an embolus? A. Yes, sir.

(Testimony of Dr. Alfred L. Balle.)

Q. Doctor, can you name or tell me some of the common causes of fat embolus?

A. Well, the fracture—— [331]

Q. Name or tell me some of the common causes of embolus? A. Well, any specific thing?

Q. Let's get to a fat embolus.

A. There is a fracture of a bone.

Q. A fracture of a bone? A. Yes, sir.

Q. Doctor, is it not true that a fracture of a bone is the most common cause of a fat embolus?

A. Yes, sir.

Q. It is? A. Yes.

Q. And Doctor, could the fracture of a bone result in a thrombus—am I stating that correctly?

A. No.

Q. By rupturing a blood vein it could not result in a thrombus? [332]

A. It could not in a thrombus. It could in an embolus.

Q. Doctor, is it or is it not true that a fat embolus may both go to the lungs and go to the brain? A. Yes, it can.

Q. Doctor, I will ask you if it is not true that when an embolus of sufficient size goes to the lungs or the brain, [336] or both, it will result in death by reason of an infarct, is that right?

A. Yes, sir. [337]

HERBERT J. MATTHEWS,

produced as a witness on behalf of the Defendant, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Jarvis:

The Witness: Assessment numbers are shown under the assessment number column, and the date on the next column, and the date the assessments were paid.

Mr. Savage: Is this the complete record of all the payments made by Mr. Fred I. Babbitt?

The Witness: No, sir.

Mr. Savage: This is only part of it?

The Witness: That is only part of it. That is from 1922, when we went on the card filing record.

Mr. Savage: The only objection I have is the record is not complete, and in that respect it may be misleading.

Mr. Jarvis: Your Honor, we are only concerned from the period July 31, 1928, to date, as brought out in the direct examination of the plaintiff in this case. It was said on that examination there was a great many assessments. I am not quoting the words, but my recollection of them, that they came at either great regularity, or it seemed every other time a payment was made there was an extra assessment.

Mr. Savage: If I may interrupt, if your Honor please, I withdraw my objection so we can proceed.

(Testimony of Herbert J. Matthews.)

The Court: It will be admitted in evidence.

(Whereupon, assessment record card referred to was received in evidence and marked Defendant's Exhibit No. A-4.) [358]

Q. Handing you Defendant's Exhibit A-4, Mr. Matthews, and ask you, can you tell the jury what extra assessments or special assessments, in addition to this \$18.00 a year, was paid by Mr. Babbitt since July 31, 1928?

A. It will take a second to count. I think it was thirteen, or eighteen. It will just take a second to count them up here. Sixteen assessments—extra assessments, of one dollar.

Q. During that period? A. Yes, sir.

Q. And how much were each one of the assessments? A. One dollar.

Q. One dollar, so that the total amount of the extra assessments during that period was \$18.00?

A. Yes, sir.

The Court: It actually would be sixteen.

Mr. Jarvis: That is all, Mr. Matthews.

Cross Examination

By Mr. Savage:

Q. Mr. Matthews, does that Exhibit A-4 contain a record of all the assessments for the dates on which you—for the dates which are noted on that card? A. Yes, sir.

Q. And you say that that is only a part of his record? [359]

A. Well, I haven't the record—I took over in

(Testimony of Herbert J. Matthews.)

1917. There is about five years that I have the records, but——

Q. You did not bring them?

A. On different forms.

Q. And you don't know what he paid by way of assessments prior to that time?

A. Well, he paid all the assessments.

Q. He paid all the assessments? A. Yes.

Q. Then he did pay all the dues and all the assessments and was a member in good standing?

A. Yes, sir.

Q. Now, were his dues or assessments reduced, or cut down by reason of the fact that he was no longer active in the Railway Mail Association.

A. No, sir.

Q. They remained the same?

A. Yes, sir.

Mr. Savage: I think that is all, your Honor.

Mr. Jarvis: That is all, Mr. Matthews, thank you.

(Witness excused.) [360]

Mr. Jarvis: I understand that the exceptions may be taken at the conclusion——

The Court: Yes, after all the instructions are given.

Now, members of the jury, it becomes the duty of the Court at this stage of the proceedings to charge you as to the law that applies to a case of this nature, and it becomes your sworn duty to accept the law as the Court states it to you, even though your views may not coincide with those as

the Court expresses them. If I am in error in outlining the law as it applies to this case, there is a provision made for correcting such errors, either by the Court itself subsequent to the trial or by an appeal to a higher court.

Your function is to decide what the facts are, and to apply the law to the evidence as you heard it here, and if you are in error on what the facts are, there is no provision made to set them aside. Therefore, it is a matter of grave importance in assuming and discharging your duties as jurors, that you consider carefully and cautiously the facts in the case, and when you have once arrived at what the facts are, then apply the law as [376] the Court states it to you in this charge.

Anything that counsel might have said to you in the course of argument concerning what the facts were is to be accepted by you if it corresponds with your own view as to what the facts are, and if it does not correspond with your views, then of course you do not need to accept it, because the purpose of argument by counsel is to explain the facts—state them as they recall them, and to draw from them such inferences as they think are proper from their point of view, but in the final analysis, you are always the judges of what the facts are. Anything that I may say to you in reference to the facts of this case, or anything that might seem to indicate to you what my views are as to the facts,—and, under the procedure in the Federal Court the Court can sum up the facts—even give his conclusions, though I do not intend to do that in this case, but

you do not have to accept my conclusions as the facts.

If you think that from what I say in these instructions indicate what my views may be, because the responsibility of finding the facts is yours, just as the responsibility of stating the law to you, is mine; just as the responsibility of counsel representing the respective litigants, is to present their side of the controversy. [377]

The plaintiff in this case—that is, the person suing, is Mrs. Jennie M. Babbitt, and the defendant in the case, the party against whom the suit is brought, is the Railway Mail Association, a corporation.

Now, the basis of this suit is on a contract, which is designated and is in evidence in this case and will be with you in your jury room, as a beneficiary department certificate and probably will be referred to as a policy, and the Court may make such reference to it here. This certificate was issued to Fred I. Babbitt during his lifetime, and at a time when he was the husband of Jennie M. Babbitt, and Jennie M. Babbitt was named in the certificate as the beneficiary, if liability to pay thereon, arose.

Mrs. Babbitt brings the action claiming that there is liability, and that there is due to her the full amount of the policy as set forth therein.

The defendant—that is, the Railway Mail Association, admits that there was such a certificate and that it was in full force and effect on July the 30, 1943, the date when Fred I. Babbitt died. It denies, however, that it is subject to any liability whatever

to the plaintiff by reason of this certificate, and it denies that on July 9, 1943, Fred I. Babbitt slipped on a rug in his home and fell, fracturing his hip, which fracture [378] later caused a fat embolus to his lungs and brain, from which he died. And then the defendant in its pleadings denies that death was the result of the injuries if any, that Fred I. Babbitt sustained, and it denies that there is four thousand dollars or any sum whatsoever due from it to Mrs. Babbitt, by reason of the existence of the policy.

And then the defendant alleges that by reason of the provisions contained in the certificate or policy between it and the plaintiff's deceased husband, it would not be liable, since the contract itself provides:

"Accidental death shall be construed to be either sudden violent death from external, violent and accidental means, resulting directly and independently and exclusively of any other cause,"

and then it provides:

"That for death occurring within a period of one year following an accident,"

and has the further provision that:

"There shall be no liability whatever when disease, defect or bodily infirmity is a contributing cause of death."

The defendant contends that the death of Fred I. Babbitt did not result wholly or at all from the injury claimed by the plaintiff, and then it asserts

that [379] such death was not the result of external, violent or accidental means resulting directly, independently and exclusively of any other cause, and that such death was not the sole result of accidental means. And then the defendant contends that death was caused by disease, and defects, and bodily infirmities of Fred I. Babbitt, which contributed to the cause of his death, or to his death.

Now from this outline that I have given you, you will note the issues of fact upon which you must pass, and in this connection you are instructed that the law places upon the plaintiff—that is, Mrs. Babbitt, the burden of establishing by a preponderance of the evidence the material allegations of her complaint before she would be entitled to a verdict, and concisely stated they are: one, that on or about July 9, 1943, her husband, Fred I. Babbitt, while the holder of a beneficiary certificate in the Railway Mail Association, suffered an accident by slipping and falling upon a rug, the fall being of such violence that it later resulted in his death on July 30, 1943. Two, that the accidental fall fractured his left hip. Three, that the fracture caused a fat embolus to his lungs and brain, which produced his death, and these things the plaintiff has the burden of proving before she is entitled to a verdict. [380]

Now, the defendant has the burden of proving by a fair preponderance of the evidence the affirmative matter that it asserts, which briefly stated, is that any injuries sustained, or accident suffered by Fred I. Babbitt, was not the result of accidental means alone, and that disease, defects and bodily infirmi-

ties was the cause of, or were contributing causes of the death of Fred I. Babbitt.

There are certain words and phrases and terms that are used in the law as they apply in this case that should be more fully defined to you. For that reason I am going to advise you as to the definitions to be applied to such expressions.

The term "preponderance of the evidence" means the greater weight of the evidence. It is not necessarily determined by the number of witnesses testifying on one side or the other, since you may be thoroughly convinced of the truth of a given allegation by the testimony of a less number of witnesses testifying on that given point, against a greater number testifying to the contrary. The "preponderance of the evidence" in a civil case means the excess of the weight of the evidence, or that amount of evidence which turns the scales, which before its introduction were evenly balanced.

The expression "visible external marks of injury [381] or violence, suffered by the body, as found in this contract of insurance, is to be construed in a broad sense, to be anything that is discernible, perceptible or evident upon observation.

In this case if you believe that Fred I. Babbitt became pale or faint, or unduly perspired or disclosed a malformation of his left hip following a fall—an accidental fall, then such conditions would be within the phrase that I have just quoted to you from the contract.

"Direct cause" means an act, or acts, which are the moving efficient cause in direct sequence, unin-

terrputed by any new cause—new efficient cause, which in this case produced the death complaint of, and which, without it, would not have happened.

Now, the term “contributing cause of death due to disease, defect, or bodily infirmity” as applied to this case, means a cause which directly contributed to the death, and without such contribution death would not have resulted to Fred I. Babbitt.

An “accident,” as that term is used here, is an event proceeding from an unknown cause or happening, without a design on the part of the person who is injured. It is an unforeseen event, casualty, or chance, so that when death results from an injury not designed, nor the [392] danger being known, it would be accidental.

The language in this certificate using the expression “external, violent and accidental means” indicates anything operating from without. The injury itself, resulting from the accident, might be either upon or within the body. The policy does not require the injury be upon the outside of the body.

The word “injury” as used in the policy includes any damage, hurt, strain or wound, or any other harmful effect on any portion of the body, whether internal or external.

Now, in order that you may more fully understand the issues here, and the facts that you must find before you can return a verdict upon the issues as made, and at the risk of repeating what has already been said to you, I shall further advise you that before the plaintiff would be entitled to a verdict you must find that the bodily injuries sustained

by Fred I. Babbitt were due to an accident which resulted in external and violent injuries, to which disease, defect or bodily infirmity did not directly contribute. In other words, to entitle the plaintiff to a verdict, she must establish that the injuries suffered by Fred I. Babbitt on July the 9th, 1943, were accidental, and that as a proximate result of such injuries he died. The fact that Fred I. Babbitt fell on July 9, 1943, does not of itself establish that such [383] fall alone was by accidental means, and in order that the plaintiff to recover herein, you must find that the fall was occasioned by accidental means, and that disease, defect, or bodily infirmity did not directly contribute thereto. If you find that Fred I. Babbitt sustained an accident and thereafter suffered death as a result thereof, but that he would either have not sustained the accident or would not have died, except that he was afflicted with some preexisting disease, defect or bodily infirmity which directly contributed to the accident or to his death, or to both, then, under such conditions, the plaintiff would not be entitled to recover herein, and your verdict would be for the defendant.

You are further instructed that the policy herein sued upon is not a life insurance policy, nor a health insurance policy. The risks it insures against, insofar as involved in this case, are loss sustained by death resulting directly from the effects or an accident that has been sustained, and unless the plaintiff has established that as a fact, she would not be entitled to recover.

If, after a consideration of all of the evidence

introduced herein, both that of the plaintiff and of the defendant, you are unable to find as a fact that Fred I. Babbitt sustained an accident which caused external violent injuries from which he died, and that such accident and the [384] resulting injuries sustained were the direct and proximate cause of his death, independent of any directly contributing cause due to disease, defect or bodily infirmity, then your verdict would be for the defendant.

You are further instructed that if you are convinced by a fair preponderance of the evidence that there was an accident which set in motion a chain of events which finally terminated in the death of Fred I. Babbitt, without the intervention of any force operating or working actively from a new and independent source, then the plaintiff would be entitled to a verdict. Another way to state the same matter is to say if you are satisfied from the evidence that Fred I. Babbitt accidentally slipped on a rug on the floor of his home, and after having slipped and fallen he sustained a fractured leg, which in turn directly caused an embolus, and as a result of which he died, and this was not directly contributed to by disease, or bodily infirmity, then the plaintiff would be entitled to a verdict.

If the injury that Fred I. Babbitt sustained resulted from an accident which was the efficient cause that set in motion the agencies that resulted in his death, without the intervention of any other independent cause, then it would be regarded as the sole and proximate cause of his death. The fact that the physical infirmity [385] of Fred I.

Babbitt, or physical infirmities might have existed, of itself would not relieve the defendant from liability, nor deprive the plaintiff of her right of recovery, unless such physical disability or disease contributed directly to his death when it did occur. In other words, if the fall caused Mr. Babbitt's death as a direct result of the accident, and even though he were physically in a weakened condition due to multiple sclerosis, or any other disease or bodily infirmity, such a fall still would be the proximate cause of his death, unless you find that such multiple sclerosis or bodily infirmity directly contributed to the injury sustained and thus produced death.

Every disease or bodily infirmity which may have some connection with the death of the insured is not a defense to an action on a policy of this kind. Before it may be considered as a defense, you must be satisfied by a preponderance of the evidence as offered by the defendant company, together with the evidence submitted by the plaintiff that such disease or bodily infirmity was of a character, type and kind as to—that that it did directly concur in the effects of the accident in producing death, and unless you find this to be a fact, the plaintiff would be entitled to a verdict. If you do find it to be a fact, then the defendant would be [386] entitled to a verdict.

The question for you to determine is, in addition to others that I have mentioned, was there an ambolus which directly and proximately was caused by an accidental fall, and was not produced or con-

tributed to by reason of multiple sclerosis, or other bodily defect, from which the deceased might have been suffering, and did it produce death? If you find this to be a fact, then the plaintiff would be entitled to a verdict.

Now in this case a substantial bit of the oral evidence that has been offered is that of what we call "expert witnesses." When a person is called as an expert witness in a particular field of knowledge or learning, and allowed to express an opinion. These opinions are for the aid and assistance of the jury. They are not for the purpose of invading the functions of the jury. Testimony of an expert witness, insofar as it is based upon observation of particular conditions, is to be considered by you as that of any other witness, but his testimony concerning the facts in the case, if in the form of his opinion, when the facts are gathered from some other source as in the case at bar here, we have the facts gathered either from—not "either," but combined with hospital records, with oral testimony, and in part with personal observation on the part of at least one of the [387] experts—that is Doctor Don Palmer, the jury is not bound to find according to expert testimony, but it should be considered by you in connection with other evidence in the case. The duty to decide rests upon you, and it is your duty to evaluate and appraise the testimony of a witness who expresses opinions precisely as you would evaluate and appraise the testimony of witnesses who testify to facts within their personal knowledge. It is for you, in the light of all the circum-

stances disclosed during the progress of the trial, to place that weight upon, and give that credit to the testimony of each witness which you conscientiously believe, in the exercise of sound judgment and good sense it is fairly entitled to receive at your hands. An expert witness can only base an opinion on facts and records introduced in evidence, and any opinion which directly or indirectly is based upon facts or records not in evidence in the case, is not to be regarded by you.

You are the sole judges of the facts in the case, and also of the credibility of the witnesses, and of the weight and value you would give to each of them. In determining as to the credit that you should give to a witness, and the weight and value you should attach to his or her testimony, you may take into consideration the conduct and appearance of the witness on the stand, the [388] interest of the witness, if any, in the result of the trial, the motive actuating the witness in testifying; the witness' relation to, or feeling for or against the plaintiff or defendant, as the case may be, the probability or improbability of the witness' statements; the opportunity the witness had to observe or to be informed on matters respecting which such witness gives testimony, and the inclination of the witness to speak truthfully or otherwise, as to matters within the knowledge of such witness. All of these matters being taken into account with all the other facts and circumstances in evidence, it is your province to give to the testimony of each witness such weight and value as you deem proper. [389]

The Court: Your exception will be allowed.

Mr. Jarvis: Thank you, sir.

The Court: Now your number two is labelled number eight. That is refused, I think, unqualifiedly.

Mr. Jarvis: That Your Honor, of course, is the question that we have debated back and forth, and I do except to the refusal of the Court to give that on the grounds that have been stated in our argument before.

The Court: Now number nine. I refused to give the first part of it. I gave the last.

Mr. Jarvis: Number nine was my number——

The Court: Well, it is number nine here, too, because we just dealt with number eight.

Mr. Jarvis: That I except to, Your Honor, on Your Honor's refusal to give that instruction, on the grounds that I have stated in regard to the others.

The Court: Yes. Now are there any exceptions to the instructions given?

Mr. Jarvis: Your Honor, I do except to the instruction that Your Honor gave in regard to the burden of proof, in the first part of Your Honor's instructions to the jury. You stated that the burden is then on the [405] defendant of proving the affirmative matter that it asserts.

The Court: Yes.

Mr. Jarvis: I take an exception to that.

I also except, Your Honor, after stating about approximate cause, you then said that the burden was on the defendant to prove that either defect, disease,

or bodily infirmity was a contributing cause, if it did not directly cause the death. In substance, those words were used.

The Court: Yes.

Mr. Jarvis: I take an exception to that, Your Honor.

I also take an exception to the fact that Your Honor a little later on stated that Mr. Babbitt fell, or the jury could find that he fell, and that it was upon the defendant,—the burden of proof was on the defendant to prove that defect, disease or bodily infirmity contributed thereto. That was as distinct as from the cause of death. Your Honor made the distinction between the cause of the fall and the cause of death, and in both of those instructions, Your Honor placed the burden of proof to prove the defect, disease or bodily infirmity was the cause or contributing cause of the fall or the cause or contributing cause to the death.

The Court: But you are not excepting to the [406] fact that the Court recognized the contention that I understood you to be making, as I determined the policy to be that the bodily infirmity or disease caused the fall or contributed directly to the fall?

Mr. Jarvis: I am not excepting to that by any manner of means, Your Honor. A little later on Your Honor stated to the jury that if they find that the fall caused the embolus, and he died from the embolus, then the plaintiff is entitled to recover, unless the defendant proves that the defect, disease or bodily infirmity was the cause of death, and I except to that charge.

I further except to the charge that Your Honor gave that the defendant must prove by a preponderance of the evidence that the disease concurred either to cause the accident or death. That statement was made in the latter part of Your Honor's instructions. I can't quote it verbatim, but it was made in substance to that effect.

The Court: I think I recall it.

Mr. Jarvis: And I further except to the charge in regard to the embolus producing the death. I don't remember Your Honor's exact words in regard to that, but there was something about the burden being upon the plaintiff, I believe, to prove the embolus and then if they did prove it, then it was on us to prove it did not cause [407] the death.

The Court: Probably this is what you have in mind, another way to state the same, that Fred I. Babbitt slipped on a rug on the floor of his home, and after having slipped and fallen he sustained a fractured leg, which in turn directly caused an embolus,—

Mr. Jarvis: Yes.

The Court: —as a result of which he died, and this was not directly contributed to by disease or bodily infirmity, then the plaintiff would be entitled to a verdict herein.

Mr. Jarvis: Yes, I except to that, Your Honor, for the same reason that it is my opinion that the burden of proof in this particular case is upon the plaintiff to prove that they came within the terms of the policy.

Your Honor, I believe, gave in substance my re-

quested instruction in regard to the testimony of the experts. I do not believe——

The Court: I gave the last paragraph of it. I did not give the first of it. I gave that part only, “You are further instructed that an expert——”

Mr. Jarvis: That is your number?

The Court: It is number nine, both your request and——

Mr. Jarvis: Yes, I think I excepted to the refusal [408] of the Court to give the first part of it.

The Court: All exceptions, by both the plaintiff and defendant will be noted and allowed, and the jury that were sent out to deliberate, were sent out upon the Court’s possibility of finding that there were such exceptions that the Court felt justified in further instructing them, and not having found any they will continue in the course of their deliberations.

(End of case.)

CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,

Official Court Reporter.

[Endorsed]: Filed March 25, 1946.

[Endorsed]: No. 11311. United States District Court of Appeals for the Ninth Circuit. Railway Mail Association, a corporation, Appellant, vs. Jennie M. Babbitt, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed April 29, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11311

JENNIE M. BABBITT,

Appellee,

vs.

RAILWAY MAIL ASSOCIATION,

Appellant.

STATEMENT OF POINTS UPON WHICH
APPELLANT RELIES

Appellant, Railway Mail Association, rely in this appeal upon the following points, to-wit:

1. To recover under the insurance contract in-

volved in this action, the plaintiff beneficiary must prove:

- (a) The existence of an insurance policy.
- (b) That the insured was a member in good standing at the time of his death by accident, of the Railway Mail Association.
- (c) The insured sustained an accident, which resulted in death.
- (d) Death resulted wholly from the accident.
- (e) The insured was suffering from no disease which contributed to his death.

2. This case should have been tried by the court and not by jury.

3. That there was not sufficient evidence to justify the submission of this cause to the jury at the conclusion of the plaintiff's testimony or at the conclusion of all of the testimony, and by reason thereof this case should have been dismissed by the Court, or the jury should have been directed to bring in a verdict for the defendant.

4. There was prejudicial admission of evidence in the trial of this case and prejudicial admission of medical testimony and conclusions to which proper objections were made, and if said objections had been sustained there was not sufficient evidence to submit to the jury, or if submitted the jury should have been instructed by the Court to bring in a verdict for the defendant.

5. The irregularity in the proceedings of the Court, jury or adverse party; orders of Court and

abuse of discretion by which the defendant was prevented from having a fair trial.

6. That there was no evidence or reasonable inference from the evidence to justify the verdict or the decision and that it is contrary to law.

7. The failure to permit defendant's Exhibits 5 and 6 for identification, being copies of plaintiff's original complaint and reply on file herein to be introduced in evidence.

8. The failure of the Court to dismiss this action at the conclusion of plaintiff's testimony.

9. The failure of the Court to direct the jury to bring in a verdict for the defendant at the conclusion of plaintiff's testimony.

10. The giving of the instructions to the jury accepted to by the defendant.

Dated at Seattle, Washington, April 29, 1946.

CATLETT, HARTMAN, JARVIS
& WILLIAMS,

/s/ JAMES G. MULROY,

Attorneys for Appellant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 30, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND ORDER ELIMINATING
ORIGINAL EXHIBITS

It is hereby stipulated and agreed by and between Railway Mail Association, Appellant, and Jennie M. Babbitt, Appellee, by their respective counsel, that all exhibits admitted in evidence at the trial of the above entitled case, and later upon appeal transmitted to the above entitled court as parts of the record herein, be excluded from printing, and that the Court be, and it is hereby, requested to consider the same in their original forms.

Dated at Seattle, Washington, May 9, 1946.

CATLETT, HARTMAN, JARVIS &
WILLIAMS, and

JAMES G. MULROY,

/s/ JAMES G. MULROY,
Attorneys for Appellant.

ALFRED LUNDIN and ANTHONY
SAVAGE,

/s/ ALFRED LUNDIN and ANTHONY
SAVAGE.

So Ordered:

/s/ CLIFTON MATHEWS,
Senior United States Circuit Judge.

[Endorsed]: Filed May 13, 1946. Paul P. O'Brien,
Clerk.